

Missouri Attorney General's Opinions - 1959

Opinion	Date	Topic	Summary
1-59	Aug 11	SAFETY RESPONSIBILITY UNIT. JUDGMENTS. DRIVER'S LICENSE. AUTOMOBILE REGISTRATION.	1. A person is entitled to the restoration of his operating and registration privileges at the end of a three-year period beginning the date proof of financial responsibility was required for the return of those privileges. 2. A person who was required to file proof of financial responsibility and who filed but failed to maintain proof is entitled to the return of his operating privileges at the expiration of three years after proof was required. He must file proof again if he desires the return of privileges during said period. 3. A judgment is presumed paid ten years after rendition, renewal or part-payment thereon, whichever comes later, and a person suspended on account of unsatisfied judgment is entitled to the return of his operating privileges at that time, subject to the future proof requirement.
1-59	Sept 16	PUBLIC EMPLOYEES. NATIONAL GUARD SERVICE. COMPENSATION.	Any employees of the state, or any department or agency thereof, or of any county, municipality, school district or other political subdivision who are now or who may become members of the National Guard, are entitled to their normal salary in addition to National Guard pay while engaged in the performance of duty in the National Guard for a period not to exceed ten working days in any one calendar year. Any city ordinance, whether enacted prior or subsequent to the enactment of Section 105.270, MoRS, Cum. Supp. 1957, which provides that such an employee as is referred to above shall receive less than his regular pay for the period referred to above spent in National Guard duty, is in conflict with Section 105.270, supra, and to the extent of the conflict, must fail.
2-59	Jan 12	TAXATION. INHERITANCE TAX.	State of Israel within terms "persons, institutions, associations or corporations" as terms are found in Sec. 145.020, RSMo Supp. 1957, levying inheritance tax on transfers. Testamentary devises and bequests to State of Israel, without further condition, are transfers solely for charitable purposes within exemption provision of Sec. 145.090, RSMo Supp. 1957, such exemption to be effective only if State of Israel grants a similar exemption.
2-59	Feb 2	CONDEMNATION PROCEEDINGS. COMMISSIONERS' REPORTS. RECORDING FEE. RECORDING FEE -	Section 523.040 RSMo 1949, requires a commissioner's report in a condemnation proceeding to be recorded, and each tract to be separately indexed in the deed records of the county in which the lands are located. Recording fee shall be taxed as costs, and recorder shall record report without tender or payment of recording fee in advance.

		WHEN COLLECTED.	
2-59	June 23	RECORDER OF DEEDS. LAND SURVEYOR.	Recorder should not refuse to accept plat on sole grounds that it does not bear signature and seal of a registered land surveyor.
2-59	Aug 18	BAIL BONDS. RULES OF CRIMINAL PROCEDURE. MAGISTRATES.	1. A bail bond need not be presented at the police station nor is it a requirement that the bonded person be taken before the magistrate. 2. The defendant is entitled to release upon approval of the bond. 3. Supreme Court Rule 21.14 requires only one bond. 4. An appearance bond that is issued prior to the actual arrest of the defendant is null and void for the reason that the magistrate is without authority or jurisdiction to require or to fix the defendant's bail.
2-59	Nov 13	Hon. Norman H. Anderson	WITHDRAWN
4-59	Aug 24	CITIES, TOWNS AND VILLAGES.	Described financial statement does not meet requirements of Section 79.160, RSMo 1949.
4-59	Sept 21	SPEED LIMIT. MOTOR VEHICLES. MUNICIPAL SPEED LIMIT.	1. The speed limit on an undivided Federal highway traveling through a municipality that has properly enacted a 30 miles per hour speed limit is 30 miles per hour, and the violation of this speed limit is a municipal offense. 2. The driver of any motor vehicle other than an emergency vehicle who drives in excess of 70 miles per hour by day or 65 miles per hour by night on an undivided Federal highway through a municipal area which has a speed ordinance is guilty of a misdemeanor under state law. 3. The operation of a motor vehicle at speeds of up to the maximum allowed by state law are not always authorized through a municipal area under state law when the situation requires a lower speed for careful and prudent operation in the highest degree of care.
5-59	Jan 22	PUBLIC ADMINISTRATORS. PRIVATE PATIENTS. STATE HOSPITAL.	It is the opinion of this department that a public administrator who in the course of his official duty becomes the guardian of an insane person and curator of such person's estate and who places such person in a state hospital as a private patient is not required to give the maintenance bond provided for in Section 202.863, RSMo Cum. Supp. 1957, because of the fact that the official bond given by him as public administrator covers such a situation.
5-59	Apr 8	BANKS. CORPORATIONS.	Sec. 362.105, RSMo 1949, is authority for a state chartered bank in Missouri to acquire by purchase the capital stock of a corporation organized to construct a bank building to be leased to the state chartered bank for its banking facilities.
5-59	Sept 1	SPECIAL ROAD DISTRICTS. ROADS AND BRIDGES. TAXATION.	(1) The special tax authorized by a vote of the residents of the LaMonte Special Road District on March 24, 1959, should not be levied by the county court. (2) The cash balance, remaining after the affairs of the LaMonte Special Road District have been wound up and all

		ASSESSMENTS.	obligations have been discharged, shall be deposited as general revenue for class 3 funds.
6-59	Apr 15	TEACHERS. TEACHERS' CERTIFICATES.	County superintendents may issue third grade certificates only on the basis of examination of applicants whose examinations are graded by the county superintendents. Issuance of certificates to teach on the basis of grades is confined to the State Board of Education.
6-59	June 11	GUARDIANS OF INSANE. BONDS.	A bond given by the legally appointed guardian of an incompetent does not make unnecessary the giving of the bond for maintenance at a state hospital as a private patient required by Section 202.863, RSMo Cum. Supp. 1957.
7-59	May 1	PUBLIC RECORDS. MANUSCRIPTS, MAPPING PROJECT. STATE GEOLOGIST SHALL ALLOW GENERAL PUBLIC TO INSPECT.	Manuscripts of aero-magnetic mapping project to be placed in open file of division, as provided by Section 256.090, RSMo 1949. Manuscripts are public records, and subject to reasonable rules and regulations; state geologist shall release them for inspection of general public. He cannot release them first on a preferential basis to mining companies which contributed funds toward expense of project.
10-59	Feb 5	CIRCUIT CLERK AND RECORDER FOURTH CLASS COUNTY COMPENSATION.	The circuit clerk and recorder of a fourth class county with a population of between 7,500 and 10,000 and with an assessed valuation of between five and six million dollars is entitled to receive an annual salary of \$2,850.00. Section 483.367, V.A.M.S., which section was repealed by the laws of 1953, has not been re-enacted.
10-59	May 26	TEACHER EMPLOYMENT.	In a situation in which prior to April 15 of any school year a teacher notifies his employing school board that he will not contract with the board for the coming year, the board is under no obligation to acknowledge or to act upon receipt of this communication and the passing of the date of April 15 without the board notifying the teacher that he will not be re-employed does not constitute re-employment of the teacher by the board.
12-59	Oct 27	INSPECTION OF MORTUARIES.	It is the opinion of this department that paragraph 1 of Section 333.035 of House Bill No. 498 enacted by the 70 th General Assembly does not authorize a member of the State Embalming Board to enter and inspect a mortuary over the protest of the owner or proprietor thereof.
13-59	Nov 11	WARRANTS FOR ARREST.	A warrant for arrest of a person charged with a misdemeanor issued out of the magistrate court of a county and directed to all peace officers of the state may be served by any such officer anywhere in the state without any additional action being taken upon the warrant.
13-59	Dec 30	BARBERS. BARBER BOARD.	We are of the opinion that the person mentioned in your opinion request is within the meaning of Section 328.010, RSMo 1949, and,

		LICENSES.	therefore, required to obtain a license from the State Barber Board pursuant to Chapter 328.
14-59	May 26	COUNTY COURT. NURSING HOMES. COUNTY HOSPITAL.	The duty owed by a county hospital towards the county's indigent old is met with the completion of medical treatment. A county court may provide for its indigent old by paying a private nursing home institution for their care if it determines this means of care to be economically expedient. The county may grant supplemental aid to its indigent old in addition to that granted by the state.
14-59	Sept 25	COMPENSATIONS. TREASURER'S. THIRD CLASS TOWNSHIP ORGANIZATION COUNTIES.	The twenty-five per cent of the fees and commissions referred to in Section 52.280, V.A.M.S. No. 2, May 1959, pertains to the maximum amount of fees and commissions which such officer is permitted to retain under provisions of Sections 52.260 and 52.270, V.A.M.S. No. 2, May 1959.
14-59	Oct 9	CLASSIFICATION OF CITIES.	A municipality of village status, which has an official population of 4,063 can, if it changes its classification, only become a city of the third class.
15-59	Feb 19	Hon. Robert L. Carr	WITHDRAWN
15-59	Sept 28	POSTAGE. TAXATION. INTANGIBLE TAX.	Five questions involving the procedure of the Director of Revenue in mailing intangible tax forms under Section 146.050, 146.055 and 146.056.
15-59	Dec 30	Hon. Milton Carpenter	WITHDRAWN
16-59	May 8	Hon. Jennie Chinn	WITHDRAWN
16-59	July 27	SCHOOLS. SCHOOL DISTRICTS. TAXES. COLLECTORS.	(1) In township organization counties, the township collector for each township in which a reorganized school district lies shall collect all taxes for the reorganized school district. (2) There is no provision in the law authorizing or permitting a city treasurer or any other city official of any city located within a legally constituted reorganized school district to collect taxes for the district.
18-59	Feb 18	Hon. J. W. Colley	WITHDRAWN
18-59	Aug 28	TOWNSHIPS. NURSING HOMES.	Two or more townships may cooperate in the building of one nursing home to serve the participating townships.
19-59	July 29	SCHOOLS. ELECTIONS. COUNTY SUPERINTENDENT OF SCHOOLS.	Procedure for conducting elections for the office of county superintendent of public schools including transmitting the returns thereof to the county clerk.

		SCHOOL DISTRICTS.	
20-59	Apr 6	BANKS AND BANKING. LOANS. NOT-FOR-PROFIT CORPORATIONS.	A bank organized under Chapter 362, RSMo 1949, may purchase bonds issued by a not-for-profit corporation in an amount not in excess of the prohibition imposed by Section 362.170, RSMo 1949.
21-59	Feb 25	ASSESSORS. TAXATION. COUNTIES. PERSONAL PROPERTY.	County assessor cannot require a listing of personal property “per room” with a valuation on each room, in addition to the statutory itemization of personal property.
21-59	May 20	Mr. H. Burks Davis	WITHDRAWN
21-59	July 16	CONDEMNATION. STATE HIGHWAY COMMISSION. COMPENSATION. COUNTY COURTS.	Iron County cannot legally pay to a landowner additional compensation for his land which was condemned by the state highway commission for a state road in an action in which final judgment of condemnation was entered on September 5, 1957.
21-59	Oct 23	COUNTY SUPERINTENDENT OF SCHOOLS. COUNTIES. SCHOOLS.	When office of count superintendent of schools vacant, clerical assistant to county superintendent may not be employed nor may any other person be employed to perform duties of county superintendent.
24-59	July 31	DEPARTMENT OF CORRECTIONS. PUBLIC SCHOOL RETIREMENT SYSTEM. STATE BOARD OF TRAINING SCHOOLS. DEPT. OF PUB. HEALTH & WELFARE. SCHOOLS.	Teachers employed by State Board of Training Schools members of Public School Retirement System and teachers employed by Division of Inmate Education of Department of Corrections to become members of Public School Retirement System when House Bill No. 258, 70 th General Assembly, becomes effective.
25-59	July 8	JUVENILE COURT. JUVENILE CODE. DIV. OF MENTAL DISEASES.	Juvenile court may retain jurisdiction of child until age of twenty-one. Juvenile committed to state mental hospital may be released by head of hospital. If released while under jurisdiction of juvenile court, child is to be returned to committing court for further disposition.
25-59	July 9	STATE HOSPITALS. PHYSICIANS. AUTOPSY. CONSENT. GUARDIANS.	(I) Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the estate and guardian of the person. (II) Consent of the guardian, whether the guardianship be one of the person or of the estate, is not required prior to performing an autopsy except in those few cases where subparagraph 5 of numbered

			paragraph 1 of Section 194.115, RSMo Cum. Supp. 1957, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, RSMo Cum. Supp. 1957, are applicable. In all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation.
25-59	July 27	MENTAL HEALTH. STATE HOSPITAL. PROBATE COURT.	The venue of proceedings instituted under the provisions of Section 202.807, RSMo Cum. Supp. 1957, relating to the involuntary hospitalization by judicial proceedings brought for the purpose of retaining in a state hospital for care and treatment a prisoner whose term has expired all as contemplated by House Bill 261, adopted by the 70 th General Assembly, is properly in the probate court of the county of the patient's residence. A state hospital would not be liable for costs of court commitment of those patient's contemplated by H.B. 261 who are carried on the hospital rolls as "state support" and who have no residence in the state of Missouri.
25-59	Aug 12	STATE HOSPITALS. COUNTY PATIENTS. PROBATE COURTS.	Section 202.863, RSMo, Cum. Supp. 1957, is applicable when a patient is committed to a state hospital by order of a probate court under the mental illness act. It is not within the province of a probate court when said court orders a person committed to a state hospital, under the mental illness act, to determine whether such person is to be admitted as a county patient.
25-59	Oct 9	DIVISION OF MENTAL DISEASES. PATIENT MAINTENANCE IN BOARDING, NURSING, OR FAMILY HOMES.	It is the opinion of this department that the Division of Mental Diseases may only appropriate for the care of a patient in a boarding, nursing or a family home an amount not to exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state hospital from which such person was transferred, but that the family of such a patient, or any friend or interested party, may contribute out of private resources an additional sum for such care which contribution would make the total amount paid to such home more than the average per capita cost of maintenance of such patient for the prior fiscal year in the state hospital from which he was transferred.
25-59	Oct 9	INMATES OF STATE INSTITUTIONS. COMMUNICATION.	The superintendent of a state hospital may open sealed personal mail addressed to private or committed patients and he may refuse to mail letters or packages from voluntary or committed patients which contain obscene matter or threats of violence to others, but he may not interfere with a communication by a patient to the court which committed him, or to the Division of Mental Diseases.
25-59	Nov 9	INTERSTATE MENTAL HEALTH COMPACT. (HOUSE BILL NO. 47	The Missouri Compact administrator of the Interstate Mental Health Compact is not given any authority under Article III (a) of House Bill No. 47 enacted by the 70 th General Assembly. The Compact administrator

		ENACTED BY THE 70 TH GENERAL ASSEMBLY).	in Missouri is not given the authority to authorize the admission of an individual in the situation set forth in the aforesaid Article III (a). Commitment procedures in Missouri, when a patient is received from another state, are necessary unless the patient qualifies for admittance under the voluntary admittance provision of the Mental Health Act. The institution in the receiving state is not liable for the cost of such commitment.
26-59	Feb 23	LOTTERIES.	The contest known as “Tangle Towns” is not a lottery.
26-59	Apr 21	ELECTIONS. COSTS OF REGISTRATION AND CANVASS IN GENERAL ELECTION IN CLAY COUNTY, MISSOURI.	We conclude that the city of Kansas City and Clay County must proportionately share the cost of registration and canvass of voters by mail for the November General Election, 1958, according to the population Kansas City bears to the total population of Clay County, all of which is set out and authorized by Section 119.180, RSMo 1949.
31-59	July 23	PROSECUTING ATTORNEY.	In proceedings contemplated by Chapter 202, RSMo 1949, no specific duties placed upon prosecuting attorneys to prepare initial papers seeking commitment of persons to State hospitals, except under Sec. 202.710, RSMo 1949, providing for initiating of criminal sexual psychopath hearings. In other cases, prosecuting attorneys’ interest must stem from interest of county and State, and their services must be preserved to protect such interests.
31-59	Oct 8	SPECIAL ROAD DISTRICTS. ROAD DISTRICTS. ROADS AND BRIDGES. TAXATION. ELECTIONS. COUNTY.	1) Upon dissolution, a special road district formed under Sections 233.320 – 233.345, RSMo 1949 the territory contained therein becomes unorganized territory; 2) Under the provisions of Section 137.065, RSMo 1949, the county court on its own motion may submit a proposition to increase the tax rate and upon the filing of a petition containing names of 10% or more of the qualified voters, they must submit the proposition; 3) The apportionment provisions of Section 137.070, RSMo 1949, are applicable only where the tax rate approved by the voters is less than the combined rate for both county and township organizations.
32-59	Mar 4	STATE BOARD OF NURSING. NURSING.	Students regularly enrolled in accredited schools of professional nursing may be employed to perform professional nursing duties during vacation periods, days off, holidays and weekends.
32-59	Dec 30	INCOME TAX. VENUE. FAILURE TO FILE REPORTS.	An income tax return is required to be filed either at a branch office of the Revenue Department or at the main office and that venue of the crime of failure to file can be properly laid in the county wherein a branch office is located or in Cole County.
33-59	Sept 16	WORKMEN’S	Section 287.215, V.A.M.S., June Pamphlet 1959, passed by the 70 th

		COMPENSATION. PROCEDURAL LAW. STATEMENTS.	General Assembly of the State of Missouri, is procedural law, and may apply to the procedures in causes of action which arose prior to the effective date of this section.
33-59	Nov 11	RECORDER OF DEEDS.	Recorder in fourth class counties still receives compensation for performance of duties with respect to veterans' discharges.
33-59	Nov 16	COUNTY HOSPITAL TRUSTEES. TERMS OF OFFICE.	The order of the County Court of Texas County made on February 16, 1959, appointing trustees to the Texas County Hospital was a valid order; the limitation to January, 1960, which was a part of the order, was contrary to law and so was invalid. The appointments actually extend until the next general election following February 11, 1959. For the reasons given above, the County Court would not be empowered to appoint new trustees in January, 1960. The County Court has no power of removal of these trustees prior to the time of the termination of their appointments, and a successor or anyone or all of them can only be appointed by the County Court when there is a vacancy on the board of trustees.
35-59	Oct 23	Hon. Thomas D. Graham	WITHDRAWN
36-59	Apr 7	CORPORATIONS. INCOME APPORTIONMENT. INCOME TAX. TAXATION.	Answers to six questions arising under Section 1430.040, RSMo 1949, relating to corporate income apportionment.
36-59	Apr 21	Hon. Larry Haake	WITHDRAWN
36-59	Apr 27	TAXATION. INCOME TAX. REGULATED INVESTMENT COMPANIES.	The option to receive cash dividend or have dividends reinvested in additional stock is income within the meaning of Section 143.100, RSMo 1949.
36-59	Apr 29	DEDUCTIONS. INCOME TAX. TAXATION.	Corporations may properly deduct the fair market value at the time of gift of donations to charitable organizations.
36-59	Oct 14	INCOME TAX. MISSOURI NATIONAL GUARD. FEDERAL RESERVED. ARMED FORCES. ACTIVE DUTY.	1. A Missouri National Guardsman is not a member of the Armed Forces of the United States on active duty within the meaning of Section 143.105, RSMo Cum. Supp. 1957, while attending summer camp or drill period pursuant to state order. 2. A ready reservist who is ordered to active duty by the appropriate Federal secretary for annual training is on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957. 3. The ready reservist attending drill period is not on active duty with the

			Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.
36-59	Nov 16	Hon. L. A. Haake	WITHDRAWN
37-59	Jan 22	Dr. H. M. Hardwicke	WITHDRAWN
37-59	May 29	TAXATION. BUILDINGS ON LEASED REAL ESTATE.	Where building located on leased lands have been assessed as personal property, the amount of the taxes for the years that the buildings have been so assessed may not be included in the sale of such buildings for delinquent real estate taxes at the delinquent tax sale.
37-59	June 18	LIBRARIES. MERGER. CITY AND COUNTY. COUNTY LIBRARY TAX. BY WHOM COLLECTED.	After merger of a municipal library district with a county library district, in accordance with the provisions of Sec. 182.040, RSMo Cum. Supp., 1957, it is the responsibility of the municipality to collect the library tax at the rate levied for county library purposes. When taxes have been collected by proper city officials, proceeds shall be turned over to county treasurer, who shall credit same to county library fund as provided by Sec. 182.020, RSMo Cum. Supp. 1957.
37-59	June 25	WATER POLLUTION BOARD. SEWAGE DISPOSAL PLANTS.	The Water Pollution Board is not authorized to grant to any one person, company, or corporation, the exclusive right to construct and operate a system for the disposal of sewage and/or other wastes in a specific watershed.
37-59	July 9	TAXATION. TAX SALES. COLLECTORS. COLLECTOR'S DEEDS.	When a collector issues a deed on the third sale of property for delinquent taxes to a purchaser who has purchased more than one tract, all of the tracts purchased by one individual must be included in one deed. Person going in boat and fishing over land flooded by river not liable to prosecution for trespassing.
37-59	Aug 6	REGISTRATION OF BIRTHS.	It is the opinion of this department that children born in a foreign country to residents of Missouri who are in a foreign country in the armed services or in employment may upon return to Missouri have made in their behalf application for registration and the issuance of birth certificates by the Department of Vital Statistics of the division of Health of Missouri, and may be so registered and may receive such certificates.
37-59	Dec 24	BUREAU OF VITAL STATISTICS.	The Bureau of Vital Statics in the State of Missouri may separate the health and medical section of the Standard Certificate of Live Birth from the upper portion of the certificate, and the health and medical section may, after analysis and preservation on IBM cards, be destroyed.
38-59	Apr 27	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS.	1. Common school districts, at a special meeting called to vote upon an annexation proposal, cannot vote to annex to either one or the other of two separate consolidated school districts at the same meeting.

			<p>2. Where more than one petition for annexation is presented to the board of directors of a common school district, it is their duty to submit the proposition contained in the first petition received by them to a vote at a special meeting called for that purpose. 3. When a special meeting for the annexation of an entire common school district to an adjoining consolidated school district, held under the provisions of Section 165.300, RSMo 1949, as amended, such district may not hold another special meeting under said section within two years from the date of such meeting. 4. The board of directors of a common school district upon receiving an annexation petition are required under the provisions of Section 165.300, RSMo 1949, as amended, to call a special meeting and submit the proposal to a vote at said meeting. They have no authority under the statute to call a special election. At the special meeting, the majority of the qualified voters present may not vote to postpone or delay submission of the annexation proposition to a formal vote. NOTE: Section 162.441, RSMo, effective 7-1-65 replaces § 165.300, RSMo 1949. Under subsection (6) nonadjoining districts may annex in certain circumstances. Under subsection (5) the two year prohibition against subsequent elections only applies where the first election was defeated by a majority.</p>
38-59	July 17	INSURANCE.	<p>“Service certificate” described in opinion and purportedly issued by Shetley Funeral Home is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri’s insurance code violates Sections 375.300 and 375.310, RSMo 1949.</p>
38-59	Sept 23	COUNTY OFFICE HOURS. SUPREME COURT RULES. COUNTY COURTS.	<p>Under the terms of House Bill No. 534 of the 70th General Assembly, truly agreed to and finally passed, it is not within the power of the county court of a third class county to authorize any county offices to be open only five days a week. Neither does House Bill No. 534 annul or amend Rule 31.05 of the Rules of the Supreme Court of Missouri which states, in effect, that the clerk’s office of every court set forth in Article V, Section 1 of the Constitution of Missouri, 1945, shall be open during business hours on all days except Sundays and legal holidays with the clerk or a deputy clerk in attendance.</p>
40-59	June 8	ASSESSMENT OF PROPERTY OWNERS.	<p>In fourth-class cities the cost of engineering services in a sanitary sewer project may not be added to the assessment against property owners.</p>
41-59	Jan 21	FOURTH CLASS CITIES. EXPENSE ACCOUNTS. CHARTER CITIES.	<p>1. The City of Berkeley, as a city of the fourth class, was authorized to provide by ordinance a flat \$50.00 monthly automobile allowance for the city engineer. 2. If the successor to the city engineer has not be selected and qualified or the duties of such officer have not been otherwise provided for under the provisions of the 1957 Charter of the</p>

			City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.
41-59	June 17	TAXATION. COUNTY COURT. COUNTY ASSESSOR.	County court must procure and maintain on file the plats referred to in Section 137.195, RSMo 1949; county court may not supplant such plats by any other system. County Court may contract with the assessor to set up a card system as a permanent record in the assessor's office.
41-59	Nov 11	MUNICIPAL COURTS. COSTS. POLICE JUDGE.	Rent for providing a suitable courtroom may not be assessed as a part of court costs in a municipal police court and paid to the police judge, by action of a city of the fourth class.
41-59	Nov 11	CITIES. TOWNS. VILLAGES. FOURTH CLASS CITIES. CITY FINANCES. TAXATION. PUBLIC UTILITY TAXATION.	A fourth class city is not required to separate funds received from the taxation of railroads and other public utilities from those received from other taxpayers for similar purposes. Only the method of assessment of property belonging to public utilities varies the collection of local taxes from the ordinary taxpayer.
42-59	May 15	SCHOOL LANDS. SALE OF SCHOOL LANDS. COUNTY COURTS.	The provisions of Sec. 166.050, RSMo, as to sale of school lands in the sixteenth sections of each congressional township are mandatory if there is no statutory exception applicable, consequently requiring a petition by the majority of the householders in the congressional township wherein the land is located. The county court where the land is situated holds the proceeds of such sale until requisition of that portion of the proceeds belonging to the adjoining county or counties by that county or counties.
42-59	Aug 3	COUNTY OFFICERS. TAX SALES.	A county officer may purchase at a tax sale unless he is charged with conducting the sale. Such an ineligible officer may not purchase, indirectly, through a relative or other person what he may not purchase directly. When a spouse of an ineligible officer purchases, the ineligible officer has an interest in the property and the sale is void. Other relatives of such officers may purchase at such sales, in the absence of fraud, collusion or interest in or for the purpose of transferring to the ineligible officer.
42-59	Sept 21	ST. LOUIS COUNTY LICENSING.	The authority given to St. Louis County, a county of the first class, to require licenses upon the businesses itemized in Section 316.040, RSMo Cum. Supp. 1957, includes those businesses which are located within incorporated areas in the county.
42-59	Sept 25	Hon. John A. Honssinger	WITHDRAWN

42-59	Sept 29	CITY MANAGER FORM OF GOVERNMENT. TRANSPORTATION OF VOTERS.	Numbered paragraph 1 of Section 78.550, RSMo 1949, does apply at a special election in a city of the third class under the city manager form of government which election is held to determine whether the city shall abandon or retain the city manager form of government.
43-59	Feb 12	TAXATION. EXEMPTION FROM TAXATION. CHARITIES.	The charter and bylaws of the Community Memorial Hospital would not appear to prevent its being a charitable institution and entitled to tax exemption if, as a matter of fact, the operation of such hospital is such as to entitle it to be considered a charitable institution.
43-59	May 7	HIGHWAY COMMISSION. PUBLIC BUILDINGS.	A contract for contemplated construction, rehabilitation or repair of highway department district offices need not be awarded by the Chief of Planning and Construction but said contract, nevertheless, must be approved by said official.
45-59	May 11	COUNTIES. PLANNING AND ZONING. COUNTY COOPERATION.	Clay County is authorized to provide for the preparation, adoption, amendment, extension and carrying out of a county plan for the areas of Clay County which include the City of Liberty, Missouri, after approval by a vote of the people of the county in accordance with Section 64.510, RSMo Cum. Supp. 1957.
46-59	Mar 5	WAREHOUSEMAN. LOCKER PLANTS.	Warehouseman licensed under Chapter 415, RSMo 1949, are excluded from Sections 196.450 to 196.515, RSMo 1949, by Section 196.510, supra.
46-59	Apr 20	SUPREME COURT RULE 26.01	In those cases in magistrate court wherein the defendant pleads not guilty and waives his right to trial by jury, the magistrate should obtain a written waiver in accordance with Supreme Court Rule 26.01.
46-59	Sept 16	CITIES. STREET REPAIRS. SPECIAL TAX.	The legislative body of any city of the third class, fourth class, of any city having special charter, and towns and villages shall have power within the municipality by ordinance, to cause the streets, avenues, alleys and public places of the city or any part thereof to be sprinkled, oiled, or repaired, surfaced and resurfaced, and the cost thereof to be provided for and defrayed by a special tax assessed on the adjoining property fronting or bordering on those surfaces repaired, etc., as frequently as that legislative body deems it necessary so long as the total cost of such improvements shall not exceed \$1.00 per front foot per annum upon said assessed property.
49-59	Dec 31	COUNTY COURTS. COUNTY ASSESSOR. ASSESSOR. OFFICERS. COUNTY OFFICERS. CLERICAL	In third and fourth class counties, allowance to county assessor for clerical and stenographic assistants is determined by county court in amount not to exceed \$600 in fourth class counties and \$1,200 in third class counties.

		ASSISTANTS.	
52-59	Apr 8	CITIES, TOWNS AND VILLAGES. INSURANCE.	Cities of Third Class in Missouri, operating with city manager form of government and having authority under Section 78.570, RSMo 1949, to fix compensation of its employees, may by ordinance provide that as part of said compensation it will defray the premium cost of group life and hospitalization coverage on its employees.
52-59	Apr 14	INSURANCE.	Miscellaneous mutual casualty company organized under Sections 379.205 to 379.310, RSMo 1949, as amended, may invest in and own all the capital stock of a regular life insurance company organized under Sections 376.010 to 376.670, RSMo 1949, as amended, but is subject to like limitations set forth in Section 379.080, RSMo 1949, applicable to stock companies.
52-59	Apr 20	INSURANCE.	Articles of Incorporation of Liberty Reserve Life Insurance Company.
52-59	May 26	INSURANCE.	Amended Articles of The Protective Life Insurance Company are in acceptable legal form.
52-59	July 8	INSURANCE.	Domestic stock fire insurance company subject to Sections 379.010 to 379.200, RSMo 1949, as amended, may invest in the entire stock issue of a foreign fire insurance company organized for the purpose of doing any of the kinds of insurance mentioned in one of the subdivisions of Section 379.010, RSMo 1949, but qualifications and limitations found in Section 379.080, RSMo 1949, pertaining to capital stock structure, and state percentages of assets to be invested, are applicable.
52-59	Aug 7	INSURANCE.	Articles of Agreement of Missouri Fidelity Life Insurance Company.
52-59	Aug 7	INSURANCE.	Amended Articles of Association of Old American Insurance Company.
52-59	Aug 7	INSURANCE.	Articles of Agreement of Security Home Life Insurance Company.
52-59	Aug 19	INSURANCE.	Articles of Incorporation of Crown Mutual Insurance Company.
52-59	Aug 26	INSURANCE.	H.B. 249, 70 th General Assembly, authorizing a combined fire and casualty policy will allow such combination policies to offer coverage "against all physical loss to property except as hereinafter excluded."
52-59	Aug 28	INSURANCE.	A fire insurance company, subject to Missouri's fire Rating Act, maintaining its own public rating record, and choosing to establish its own audit division to audit its daily reports, is amenable to periodic examination by the Superintendent of the Division of Insurance to insure compliance with the Rating Act, or, in the alternative, may be directed by the Superintendent to order and instruct its agents to forward each day copies of their daily reports to the Division of Insurance where they may be checked against the public rating record of the company in order to determine if deviation or discrimination in

			rates is shown in the light of such public rating record.
52-59	Nov 12	INSURANCE.	Foreign insurance company reinsuring stipulated premium plan life insurance business, ceded to it by Missouri stipulated premium plan life company surrendering its charter, is liable to assessment of a Missouri premium tax on such business under Missouri's retaliatory law, Section 375.450, RSMo Supp. 1957.
54-59	May 1	AGRICULTURE. FERTILIZER. DISTRIBUTORS.	Potash producers and other suppliers of unmixed fertilizer materials who sell those materials to a distributor registered under Sections 266.290 through 266.350, RSMo Cum. Supp. 1957, but who make deliveries of those fertilizer materials to make deliveries of those fertilizer materials to "blenders" or ultimate consumers on orders placed with such a distributor are not to be considered distributors within the provisions of Sections 266.290 through 266.350, RSMo Cum. Supp. 1957.
54-59	May 20	STATE PURCHASING AGENT.	The state purchasing agent need not consider a bid proposal for public printing which does not substantially conform to the specifications upon which bids were solicited and received.
58-59	Mar 31	COUNTY CLERKS. FEES IN REGARD TO DRAINAGE DISTRICTS.	Additional fees provided for county clerks under Section 246.030, providing for fees paid to the county clerk in connection with drainage districts are to be construed to include extension.
58-59	July 14	Mr. Glennon E. McFarland	WITHDRAWN
58-59	Oct 5	STATE BOARD OF COSMETOLOGY.	Any registered operator is qualified to train an apprentice in any of the classified occupations governed by the cosmetology laws. Those who train an apprentice are not subject to the provisions of Section 329.080 VAMS, requiring an instructor's license to teach the classified occupations.
62-59	Mar 5	Hon. William B. Milfelt	WITHDRAWN
62-59	Apr 15	ELECTIONS. WATER DISTRICTS.	Special Sections 247.130 and 247.180, relating to water district election procedures were not impliedly repealed by Sections 113.490 to 113.870, providing general voting and registration laws for counties over 450,000 as enacted in 1957.
62-59	Sept 16	SCHOOL DISTRICTS. SCHOOL REORGANIZATION.	The mere encirclement of one district by territory comprising a proposed reorganized school district would not of itself be improper, provided that there has otherwise been complete compliance with the laws of Missouri applicable to the reorganization of school districts.
65-59	Jan 15	Hon. William C. Myers, Jr.	WITHDRAWN

65-59	Jan 22	COUNTY SUPERINTENDENTS. JUVENILE OFFICERS.	There is no conflict between the duties of the county superintendent of schools and the juvenile officer in connection with the compulsory school attendance of children.
65-59	Feb 19	ROADS & HIGHWAYS. COUNTIES. COUNTY COURT. BRIDGES.	Bridge built by county on public road remains property of county, and may be moved to a new location, when road on which bridge is located has been abandoned.
65-59	Feb 25	Hon. William C. Myers, Jr.	WITHDRAWN
65-59	July 17	SCHOOLS. SCHOOL DISTRICTS.	County board of education may revise reorganization plan and submit such revised plan to the voters after proposed plan has been twice disapproved by the State Board of Education.
65-59	Sept 9	SHERIFF'S LIABILITY FOR MONEY OR PROPERTY.	The Sheriff of Jasper County is liable for any moneys stolen from him which came into his hands in the course of his discharge of the duties of his office whether such funds were public or private.
65-59	Dec 8	TRANSFER OF REGISTRATION OF VOTERS AND COST THEREOF.	In a situation where there is reestablishment of voting wards in the city of Carthage, the necessary adjustment as to the ward and precinct location of registered voters should be made by a transfer of registration by the county clerk of Jasper County. The cost of such transfer should properly be borne by Jasper County.
66-59	Apr 29	GIFTS. INSTRUCTORS. PRISONS.	A gift may be accepted for use within the penitentiary to further the recreation, music and fine arts program or to build a building to serve the needs for extra-curricular activities in the prison. The warden may permit visitors to instruct prisoners when the visiting instructor does not assume supervisory control of the prisoners even though the visiting instructor may be paid by some organization or individual in no way affiliated with the State of Missouri.
66-59	June 2	ASSESSORS. COUNTY ASSESSOR. COUNTY COURT.	The provisions of Section 53.140, RSMo Cum. Supp., 1957, would not prohibit the compensation of clerical or stenographic assistants within the limits of 53.095, RSMo Cum. Supp. for making entries in the real and tangible personal assessment books.
66-59	Aug 11	HOUSE BILL NO. 261.	House Bill No. 261 enacted by the 70 th General Assembly applies to prisoners in an institution of the Department of Corrections who have been confined in a state mental hospital but who have been returned to the institution prior to the effective date of the act.
66-59	Sept 15	HOUSE BILL NO. 262.	It is the opinion of this department that House Bill No. 262, enacted by the 70 th General Assembly, is not retroactive; that it became effective on August 29, 1959; that it does not apply to persons confined, prior to August 29, 1959, in institutions maintained by the Department of

			Corrections.
69-59	Apr 20	ASSESSORS. OFFICERS.	Section 53.095, RSMo Cum. Supp. 1957, is to be construed to apply only to clerical and stenographic assistants for county assessors and not to be applicable to the employment of deputy assessors.
69-59	July 8	MAGISTRATE COURT. JURY FEES. COUNTY BUDGET.	Magistrate court costs in criminal cases for which the county is liable should be paid from class five expenditures under Sections 50.680 and 50.710, RSMo 1949. Such costs must be paid whether or not the county court has provided for the payment of such from class five expenditures in their current county budget and, in event of such failure, said costs may be paid from any surplus available in class six or unused funds of other classes may be transferred to class five in order to pay said costs.
70-59	Feb 18	FOREST CROP LAND.	It is the opinion of this department that the law setting forth classifications of forest crop land and providing for grants to counties in lieu of taxes for such is valid and that use of such classified forest crop land in a manner contrary to the rules promulgated by the Forest Crop Land Commission established by Chapter 254, RSMo 1949, subjects such land to removal from classification as forest crop land.
70-59	Apr 21	UNIVERSITIES AND COLLEGES. SCHOOLS. SALES TAXATION. TAXATION. EXEMPTION FROM TAXATION.	The University of Missouri Press which publishes worthy special interest works not of sufficient interest to make their commercial publishing worthwhile is engaging in an educational function or activity and, therefore, sales at retail by the University of Missouri Press to private individuals are exempt from sales tax.
70-59	May 1	HIGHWAY DEPARTMENT. HIGHWAY FUND. UNEMPLOYMENT COMPENSATION.	It would require a constitutional amendment to amend Section 30, Article IV of the Constitution of 1945 in order to permit the Highway Department to pay unemployment compensation to its employees out of the Highway Fund.
71-59	Sept 16	ATHLETIC COMMISSION. BOXING. LICENSE NOT REQUIRED. LICENSE NOT REQUIRED - WHEN.	When a proposed public dinner, sponsored by a labor union, is to be held at a St. Louis hotel, at which a special feature is a boxing program, and the only tickets offered for sale, or sold, are for the dinner, the event is not a boxing, sparring or wrestling exhibition within the meaning of Section 317.020, RSMo Cum. Supp. 1957. The Missouri Athletic Commission has no jurisdiction over said event and the sponsors are not required to secure the permission of or a license from the commission to hold the dinner.
72-59	Mar 5	MUNICIPAL AND CIRCUIT COURT	A cost judgment against a municipality for costs incurred on an appeal to the circuit court from a conviction in a municipal court in instances

		COSTS. CIRCUIT CLERK.	where upon appeal such conviction is set aside and the defendant is acquitted, may not be recovered except in the case of a city of not less than 300,000 nor more than 700,000 population. When the circuit clerk is involved in litigation in the circuit court, either as plaintiff or defendant, whether singly or jointly with others, the writ of summons and all other process shall be issued by the clerk of the county court.
72-59	Apr 14	CITY NIGHT WATCHMEN. NIGHT WATCHMEN. CITY OFFICERS. ARREST.	A night watchman's powers and duties in fourth class cities are to be prescribed by ordinance and include the power to arrest if given by ordinance.
72-59	Oct 23	CIRCUIT COURTS. COURTS.	Senate Bill No. 96, 70 th General Assembly, abolished the statutory requirement that certain terms of the Circuit Court of Macon County be convened at LaPlata, and there is no longer any statutory provision for maintaining a courtroom at LaPlata and paying the expenses therefor.
76-59	Apr 14	PROSECUTING ATTORNEY. MAGISTRATE JUDGE. PEACE BOND.	We are of the opinion that (1) it is not the duty of the prosecuting attorney to represent a complainant in a peace bond proceeding; (2) a magistrate judge may continue a matter in order to allow time for the securing of witnesses, a jury and procurement of counsel for defendant; (3) the magistrate court does not have authority to require a defendant after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing; (4) the defendant may waive trial by jury in a peace bond proceeding.
76-59	Apr 29	TAXATION. COUNTY COURTS.	The county court is empowered by the provisions of Section 137.270, RSMo 1949, to remove tax exempt property from the back tax book upon proper application and at anytime before the taxes are paid. A like power to correct the back tax book is vested in the county court by virtue of the provisions of Section 140.040, RSMo 1949.
76-59	Aug 11	TAXATION.	Senate Bill No. 179 adopted by the 70th General Assembly relating to the assessment and taxation of the flight equipment of airline companies does not govern the manner, method, and procedure for the assessment of such flight equipment of said companies for the year 1959.
76-59	Dec 15	SCHOOLS. SCHOOL DISTRICTS. TAXATION. STATE TAX COMMISSION.	School district may appear before State Tax Commission at hearing on appeal of assessment and may employ expert witnesses for such purpose.
77-59	Jan 6	PREVAILING WAGE	A construction project in the state of Missouri by the federal

		LAW.	government does not come within the purview of the Prevailing Wage Law.
80-59	June 22	Mr. W. T. Scott	WITHDRAWN
81-59	Apr 20	TRAINING SCHOOLS. JUVENILE COURT. JUVENILE CODE.	Juvenile court loses jurisdiction of child when child is committed to, and received by, State Board of Training Schools. Jurisdiction revested in the committing court only upon application of State Board of Training School for order relieving it of custody.
82-59	Mar 16	Hon. Paul R. Sims	WITHDRAWN
83-59	Jan 15	Hon. Vance O. Smith	WITHDRAWN
83-59	Apr 6	PUBLIC INFORMATION. COUNTY WELFARE AGENTS. CONFIDENTIAL RECORDS.	A director of a county welfare office is not authorized to refuse to testify in court, whether a juvenile hearing (closed to the public) or to a regular court hearing (open to the public), whether a person is receiving aid from the Division of Welfare, or as to the amount of said aid.
83-59	June 23	SPECIAL ROAD DISTRICTS. CITY OR TOWN ROAD DISTRICTS. QUARRIES.	A special road district, which maintains its own rock quarry, may sell the surplus product thereof to other governmental bodies.
83-59	Sept 10	MOTOR VEHICLES. "GO-CARTS". LICENSES. DEPARTMENT OF REVENUE.	"Go-carts" are "motor vehicles" within the Missouri statutes regulating the licensing and driving of motor vehicles if they are driven upon the highways. As motor vehicles, "go-carts" must meet the statutory lighting and equipment regulations for motor vehicles if they are to be driven upon the highways.
84-59	Mar 2	SCHOOLS. SCHOOL DISTRICTS. BANKS AND BANKING.	School district may not invest funds in savings deposits.
84-59	Mar 20	MUNICIPAL LIBRARY ELECTIONS. ELECTION EXPENSES. COUNTY COURT.	The County of Cape Girardeau is responsible and liable for the expenses of a municipal library district election authorized by Section 182.030, RSMo Cum. Supp. 1957.
84-59	Apr 3	Hon. Richard E. Snider	WITHDRAWN
84-59	Nov 11	TAXATION.	(1) A county collector in a county of the third class is to be

		COUNTY COLLECTOR. SCHOOLS.	compensated for performing services in connection with a supplemental tax book on the same basis that he is compensated for services performed in connection with the regular tax book. (2) Where a corrected tax rate for a particular school district is certified after the average rate, the average rate should be re-determined and the railroads and public utilities' taxes should be re-computed based upon the corrected average rate. (3) The school district or county superintendent of schools would not be liable for the additional expenses incurred by the county collector for making corrections based upon a supplemental tax book made necessary by the failure of the proper officials to certify in the first instance the correct tax rate for a particular school district.
85-59	Feb 10	PRISONS. SENTENCES. CUMULATIVE SENTENCES. JUDGMENTS.	A prisoner sentenced subject to Section 222.020 serves a cumulative sentence. He serves his first sentence completely, then starts on his second sentence. Prison authorities are powerless to change the order in which the sentences are served.
85-59	Aug 18	TIME OF PAROLE APPLICATION.	It is the meaning of House Bill No. 262, enacted by the 70 th General Assembly, that allowed time served in jail does apply as time served on a sentence to the Department of Corrections for parole application purposes.
85-59	Sept 17	PROSECUTING ATTORNEY'S MILEAGE.	A prosecuting attorney is not entitled to mileage for driving to the magistrate court in a town other than the town in which he resides, but in the same county, in order to discharge his official duties. However, prosecuting attorneys may be reimbursed for actual and necessary traveling expenses incurred in the investigation of crimes.
88-59	Jan 6	APPROPRIATIONS. GENERAL ASSEMBLY.	Right of General Assembly to amend an appropriation law.
89-59	Mar 24	CORPORATIONS NOT FOR PROFIT.	Section 355.335, RSMo Supp. 1957, of Missouri's General Not for Profit Corporation Law, does not authorize Secretary of State of Missouri to issue a certificate of authority to Teachers Insurance and Annuity Association of America, a New York corporation, to conduct its affairs in Missouri.
89-59	Apr 29	CORPORATIONS.	Small business investment company may be organized under Missouri General and Business Corporation Act.
89-59	Sept 14	ELECTIONS.	Declarations of candidacies for nomination to circuit judgeships in divisions three or four of the 13 th judicial circuits prior to redesignation of said judicial circuit as the twenty-first judicial circuit by S.B. 96, 70 th General Assembly, should be considered as filed for offices in the 21 st judicial circuit, and should be so certified by the Secretary of State.

89-59	Dec 16	SCHOOLS. SCHOOL DISTRICTS. COUNTY COURT.	County court may not attach unorganized territory to school district not contiguous thereto.
90-59	Mar 2	CERTIFICATE OF TITLE. AUTOMOBILE TITLE. SALES.	A buyer of an automobile may, by his actions, create an agency relationship between himself and the seller of an automobile so that a valid transfer results when the dealer submits the title and the application for transfer to the Department of Revenue even though the certificate of title was never physically in the hands of the buyer.
90-59	July 22	NON-PARTISAN BOARDS. POLITICAL PARTIES OR PARTY MEMBERSHIP. REMOVAL FROM NON-PARTISAN BOARDS.	An individual's political affiliations are determined by his actual manifestations or professions of loyalty to a political party, not merely his professed loyalty to one party. Where a non-partisan board contains an excess of members from any one party, its acts are not invalid, third parties and the general public are protected. Where there is an excess of members from any one party on a non-partisan board contrary to law, the defectively appointed member may be removed in a direct proceeding challenging the title to his office.
92-59	Mar 24	TAXATION AND REVENUE.	Property acquired by county under provisions of Section 205.010 for county health center purposes is except from taxation.
92-59	July 6	Hon. Jasper R. Vettori	WITHDRAWN
93-59	Mar 27	Hon. Thomas A. Walsh	WITHDRAWN
93-59	Sept 10	FIRST CLASS CITIES. SPECIAL ASSESSMENTS. TAXATION. STATE IMMUNITY FROM SPECIAL ASSESSMENT TAXATION.	State property is not subject to special assessment taxation by the terms of Section 88.333, RSMo 1949, subjecting other normally tax exempt entities to special assessment taxation in first class cities. To subject the state to special assessment taxation the Legislature, by statute, must name the state or there must be clear implication by the statutory working that the state, as a body, is subject to special assessment taxation.
93-59	Nov 6	LEGISLATURE. GENERAL ASSEMBLY. MILEAGE. LEGISLATIVE COMMITTEES. EXPENSE ACCOUNTS.	Members of Interim Committee on Labor created by House Concurrent Resolution No. 13, 70 th General Assembly, are entitled to mileage at 7 cents per mile.
96-59	July 15	ABTRACTOR'S BOOKS SUBJECT TO ASSESSMENT AND TAXATION.	An abstractor's books and/or records are tangible personal property and are subject to assessment and taxation.

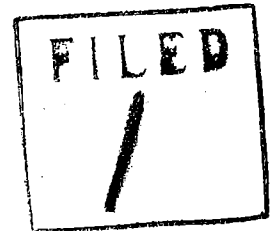
96-59	Oct 1	SCHOOLS. SCHOOL FOR THE BLIND. SCHOOL FOR THE DEAF. STATE BOARD OF EDUCATION. TRUSTS.	State Board of Education may retain investments coming to it for the use of Missouri School for the Blind and Missouri School for the Deaf if prudent man under all circumstances prevailing would do so.
97-59	Feb 12	JOHNSON GRASS CONTROL. COUNTY WEED BOARD AGRICULTURE DEPARTMENT.	Section 263.265, RSMo Cum. Supp. 1957, authorizes the county court, township board and special road district of any county declared a Jonson grass extermination area to expend the tax which this section authorizes for the purpose of controlling and eradicating Johnson grass only on county roads and right of ways.
97-59	July 15	Senator Jasper M. Brancato	WITHDRAWN
97-59	Sept 25	COUNTY OFFICERS. SHERIFFS.	A sheriff is not entitled to a fee for service of a writ of execution in a misdemeanor case where punishment is assessed at a fine and costs, if such fine and costs are paid before the issuance of a writ of execution or at the time of conviction. If such fine and costs are not paid before the issuance of a writ of execution, the sheriffs' fee for service of a writ of execution becomes a part of the costs to be collected by the sheriff.
97-59	Oct 23	Hon. Robert P. C. Wilson, III	WITHDRAWN
97-59	Dec 2	COLLECTION. DELINQUENT PERSONAL TAXES.	A county court in a county of the third class is not authorized to compromise a judgment obtained for the collection of delinquent, tangible, personal property taxes. It is the further opinion of this department that it is the duty of the prosecuting attorney of a county of the third class to file suits for the collection of such taxes and to charge the fees authorized by Section 140.740, RSMo Cum. Sup. 1957, and upon collection of same to pay such fees into the county treasury.
97-59	Dec 24	COMMERCIAL MOTOR VEHICLE.	A one-half ton pickup truck, although used primarily for the transportation of persons and not regularly used for the transportation of freight and merchandise, is a commercial motor vehicle within the meaning of numbered paragraph one of Section 301.010, RSMo, C.S. 1957, and being so its owner must comply with Section 301.330, RSMo, C.S. 1957.

SAFETY RESPONSIBILITY UNIT:
JUDGMENTS:
DRIVER'S LICENSE:
AUTOMOBILE REGISTRATION:

A person is entitled to the restoration of his operating and registration privileges at the end of a three-year period beginning the date proof of financial responsibility was required for the return of those privileges. 2. A person who was required to file proof of financial responsibility and who filed but failed to maintain proof is entitled to the return of his operating privileges at the expiration of three years after proof was required. He must file proof again if he desires the return of privileges during said period. 3. A judgment is presumed paid ten years after rendition, renewal or part-payment thereon, whichever comes later, and a person suspended on account of unsatisfied judgment is entitled to the return of his operating privileges at that time, subject to the future proof requirement.

August 11, 1959

Honorable A. C. Abbott
Acting Supervisor
Safety Responsibility Unit
Department of Revenue
Jefferson City, Missouri



Dear Mr. Abbott:

You recently asked our opinion as follows:

"In the administration of the Motor Vehicle Safety Responsibility Law, it has become necessary to request an official opinion of the Attorney General's Office as to the procedure to be followed by this Unit in requesting proof of financial responsibility for the future, such request originating as a result of an unsatisfied judgment, revocation, or suspension of licenses resulting from a conviction.

"Section 303.100, Missouri Revised Statutes, provides that the director shall suspend license and registration upon receipt of a certified copy of a judgment. Subsequent sections provide that the judgment debtor shall give and thereafter maintain proof of financial responsibility for the future for a period of three years.

"In the past, the procedure has been to require such proof at the end of the suspension period, and upon receipt of such proof the suspension would be lifted. At the end of the three year period, provided current proof was on file, the requirement would be terminated and our case would be closed.

"Recently, a question has arisen as to the exact

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interpretation of the statute as to the following:

(1) Is it possible for this Unit to close our files on a case at the end of the three year period if proof of responsibility is not on file at the termination date?

(2) Would the fact that 10 years or more had elapsed since a judgment was rendered, and such judgment had not been satisfied, relieve the judgment debtor of the requirements as set forth under this statute? What would this Unit require as acceptable evidence of this fact?"

After further inquiry we find that the factual situation giving rise to the first question in the opinion is as follows. A person has his license and registration suspended and under applicable law is required to furnish proof of future financial responsibility before these privileges can be returned to him. Thereafter this person either fails completely to furnish such proof or furnishes the proof for a time and then defaults before the end of the required three-year period. (See Section 303.280, RSMo Cum. Supp. 1957).

The position of your department in the past has been:

1. That no registration or license was returned when proof of financial responsibility was required as a prerequisite of its return until proof of financial responsibility was given regardless of the lapsed time.

2. That if proof of financial responsibility was given and then the proof lapsed before the expiration of the three-year period the privileges were not returned after that period unless proof was given of financial responsibility on the last day of the three-year period regardless of total lapsed time.

It is this procedure about which you inquire in your first question.

Section 303.150, RSMo Cum. Supp. 1957, reads as follows:

"1. Whenever the director, under any law of this state, suspends or revokes the license of any person upon receiving record

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of a conviction or a forfeiture of bail, the director shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

"2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person, until permitted under the motor vehicle laws of this state, and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

"3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person, until he shall give and thereafter maintain proof of financial responsibility.

"4. Whenever the director suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility."

Section 303.110, RSMo Cum. Supp. 1957, deals with the situation where the person has on file against him and unsatisfied

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judgment and thereafter either stays, satisfies in full or to the extent required by law said judgment. It reads in part as follows:

"* * * nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such final judgment is stayed, satisfied in full or to the extent hereinafter provided and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 303.100 and 303.130. * * *"

This section also requires proof of future financial responsibility.

Section 303.280, RSMo Cum. Supp. 1957, reads as follows:

"1. The director shall upon request consent to the immediate cancellation of any bond or certificate of insurance, or the director shall direct and the state treasurer shall return to the person entitled thereto, any money or securities deposited pursuant to this chapter as proof of financial responsibility, or the director shall waive the requirement of filing proof, in any of the following events:

"(1) At any time after three years from the date such proof was required when, during the three-year period preceding the request, the director has not received record of a conviction or a forfeiture of bail which would require or permit the suspension or revocation of the license, registration or nonresident's operating privilege of the person by or for whom such proof was furnished; or

"(2) In the event of the death of the person on whose behalf such proof was filed or the permanent incapacity of such person to operate a motor vehicle; or

"(3) In the event the person who has given proof surrenders his license and registration to the director.

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"2. The director shall not consent to the cancellation of any bond or the return of any money or securities in the event any action for damages upon a liability covered by such proof is then pending or any judgment upon any such liability is then unsatisfied or in the event the person who has filed such bond or deposited such money or securities, has, within one year immediately preceding such request been involved as an operator or owner in any motor vehicle accident resulting in injury or damage to the person or property of others. An affidavit of the applicant as to the nonexistence of such facts, or that he has been released from all of his liability, or has been finally adjudicated not to be liable, for such injury or damage, shall be sufficient evidence thereof in the absence of evidence to the contrary in the records of the director.

"3. Whenever any person whose proof has been canceled or returned under subdivision (3) of subsection 1 of this section applies for a license or registration within a period of three years from the date proof was originally required, any such application shall be refused unless the applicant shall re-establish such proof for the remainder of such three-year period."

We feel that the three-year period in the foregoing statute begins to run when the director is entitled under the law to return a person's privileges providing that person provides proof of financial responsibility.

If a person has filed proof of financial responsibility but that proof has been canceled or returned under subsection (3) of section 1 of the above statute before the end of the three-year period, such person must re-establish proof of his financial responsibility if he desires the return of his privileges before the expiration of the three-year period. We feel this is clear from paragraph 3 of Section 303.280. If, however, such a person qualifies under subsection (1) of paragraph 1 in that more than three years has elapsed from the date when such proof was required and if such person also qualifies with regard to the remainder of the restrictions in that subparagraph, then we feel

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that his license should be returned to him without further requirements as to proof of his financial responsibility. It is our opinion further that a person who applies for the return of his privileges after the lapse of over three years from the date proof was required, such privileges should be restored without further requirement as to proof of financial responsibility providing the person meets the other requirements set forth in subparagraph (1) of paragraph 1 of Section 303.280, supra.

Question 2 deals with the so-called statute of limitations on judgments. Question 2 reads as follows:

"(2). Would the fact that 10 years or more has elapsed since a judgment was rendered, and such judgment had not been satisfied, relieve the judgment debtor of the requirements as set forth under this statute? What would this Unit require as acceptable evidence of this fact?"

Section 516.350, Revised Statutes of Missouri, 1949, reads as follows:

"Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

Section 303.110 requires the director to suspend all privileges when there is an unsatisfied judgment outstanding against

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an individual and not to re-issue or renew any license until such judgment is stayed, satisfied in full, or to the extent hereinafter provided.

Section 303.120 allows partial satisfaction of judgments.

Section 516.350 appears in a chapter of the statutes dealing with statutes of limitation. Its wording, however, is peculiar in that it raises a presumption of payment after the expiration of ten years. This presumption has been held by the court to be conclusive. The court draws a distinction between the presumption of payment in this statute and the ordinary bar to recovery found in other statutes of limitation. In the case of *Wormington v. City of Monett*, 218 S.W. 2d 586, the court, referring to this statute, says as follows on page 588, subsection 3:

"[3] The conclusive presumption of payment created by Section 1038, though imposing a limitation on actions on judgments, is to be distinguished from the bar of the remedy created by the usual statute of limitation. The usual statute of limitation imposes a bar to the recovery of the debt; it operates to prohibit an action upon the debt. On the other hand a presumption of payment statute such as Section 1038, wipes out or cancels the debt itself; it extinguishes the right of action. It is not concerned with the remedy because there is no right left to be enforced."

We, therefore, feel that under the law of Missouri a judgment that has not been revived or paid on for over ten years is presumed to have been paid and that such payment wipes out or cancels the debt itself as completely as if the judgment had, in fact, been satisfied by payment. It should be noted also that Section 516.350 refers to judgments of courts of record and that magistrate courts, circuit courts and courts of common pleas are all courts of record in Missouri. Therefore, this section applies to judgments from any of those courts. Since the judgment in the eyes of the law is deemed paid, the reason for the suspension of the license or registration is gone and the privileges should be returned, subject to the future proof restriction found in Section 303.110 as before noted.

We feel that any attempt to revive the judgment will be noted

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in the court record as will any payment properly made. Therefore, the clerk of court in question should certify according to the records of the court:

1. The date of the original rendition of the judgment;
2. The date of any revival upon personal service;
3. The date of any payment of record.

Proceedings to revive judgments are considered as ancillary proceedings to the original cause and will, therefore, be on file in the court rendering the judgment. (See Buder v. Hughes, 166 S.W. 2d 516, and Hudson v. Wright, 103 S.W. 8). If the record of the clerk shows that over ten years have elapsed between the present date and the date of the original rendition of the judgment and that no payments or proper proceedings to revive said judgment have been filed, the judgment should be treated as satisfied and the department should proceed accordingly. If there have been revivals of the judgment or payments made on the judgment, the date of the last recorded payment or revival, whichever is later, starts the running of the ten-year period and ten years must lapse after that date in order to satisfy the judgment under Section 516.350.

CONCLUSION

It is the opinion of this office that:

1. A person is entitled to the restoration of his operating and registration privileges at the end of a three-year period beginning the date proof of financial responsibility was required for the return of those privileges provided he meets the other qualifications set out in Section 303.280.
2. A person who was required to file proof of financial responsibility and who thereafter files but fails to maintain proof is entitled to the return of his operating and registration privileges after the end of the three-year period for which proof was originally required without filing proof of financial responsibility as of the last day of said period but such person must re-file and maintain proof of financial responsibility during said period if he desires the return of his privileges during said period.
3. A judgment is presumed to be paid ten years after its rendition if it has not been paid on of record or revived. If the judgment has been paid on or revived, it is presumed paid ten years after the last payment or revival and privileges may be returned provided the person furnishes proof of financial

Honorable A. C. Abbott

responsibility for a three-year period thereafter.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

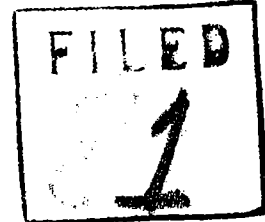
JOHN M. DALTON
Attorney General

JEC:mc

PUBLIC EMPLOYEES: Any employees of the state, or any department or
NATIONAL GUARD SERVICE: agency thereof, or of any county, municipality,
COMPENSATION: school district or other political subdivision
who are now or who may become members of the
National Guard, are entitled to their normal
salary in addition to National Guard pay while engaged in the perform-
ance of duty in the National Guard for a period not to exceed ten working
days in any one calendar year. Any city ordinance, whether enacted
prior or subsequent to the enactment of Section 105.270, MoRS, Cum. Supp.
1957, which provides that such an employee as is referred to above shall
receive less than his regular pay for the period referred to above spent
in National Guard duty, is in conflict with Section 105.270, supra, and
to the extent of the conflict, must fail.

September 16, 1959

Major General A. D. Sheppard
Office of the Adjutant General
State Office Building
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"Your attention is invited to Section 105.270
RSMo 1949, as amended by the 1957 Supplement,
pertaining to military leave of absence for
public officers and employees, which was passed
in 1955.

"Do you interpret the above law to mean that an
employee of the state, or any department or
agency thereof, or of any county, municipality,
school district, or other political subdivision,
and all other public employees of this state who
are now or may become members of the National
Guard are entitled to their normal salary paid
by the state or any other subdivision thereof,
in addition to their National Guard pay while
engaged in the performance of duty or training
in the service of this state for a period not to
exceed ten working days in any one calendar year?

"A City Ordinance, reads, in part as follows:

'Military Leave

1) Temporary Training Periods

a) Any employee who is a member
of a military reserve organization or National
Guard unit shall be entitled to two weeks leave
plus authorized travel time to attend annual
military training camps or naval reserve cruises
in addition to other authorized leaves. Not

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more than one such leave per fiscal year shall be granted.

b) The employee shall be entitled to compensation from the city to equal in amount to the difference between his regular city pay and the military pay for the period of authorized military leave referred to in paragraph a) above.

"Is this ordinance in conflict with Section 105.270 RSMo 1949, as amended by the 1957 Supplement, and whether it makes any difference if the Ordinance were passed prior to or subsequent to the enactment of Section 105.270 as amended?"

Your first question is whether an employee of the state, of a county, or other political subdivision who is now or who may become a member of the National Guard is entitled to his normal salary in addition to his National Guard pay while engaged in National Guard duty for a period not to exceed ten working days in any one calendar year.

We believe that the answer to this question is in the affirmative. Section 105.270, MoRS, Cum Supp. 1957, reads:

"1. All officers and employees of this state, or of any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state who are or may become members of the national guard or of any reserve component of the armed forces of the United States, shall be entitled to leave of absence from their respective duties without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state or of the United States under competent orders; except that an officer or employee while on such leave shall be paid his salary or compensation for a period not to exceed a total of ten working days in any one calendar year.

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"2. Before any payment of salary is made covering the period of the leave the officer or the employee shall file with the appointing authority or supervising agency an official order from the appropriate military authority as evidence of such duty for which military leave pay is granted which order shall contain the certification of the officer or employee's commanding officer of performance of duty in accordance with the terms of such order."
(Emphasis ours.)

The underscored portion of the above section makes it amply clear that such employees are to receive their regular salaries while on National Guard duty. The city ordinance to which you refer reads:

"Military Leave

1) Temporary Training Periods

a) Any employee who is a member of a military reserve organization or National Guard unit shall be entitled to two weeks leave plus authorized travel time to attend annual military training camps or naval reserve cruises in addition to other authorized leaves. Not more than one such leave per fiscal year shall be granted.

b) The employee shall be entitled to compensation from the city equal in amount to the difference between his regular city pay and the military pay for the period of authorized military leave referred to in paragraph a) above."

It is readily apparent that the above ordinance is in conflict with Section 105.270, supra, inasmuch as it reduces the regular pay of a city employee who comes within its compass while such employee is taking National Guard training.

It is a well-known principle of Missouri law that when a city ordinance is in conflict with a statute, the ordinance must fail to the extent of such conflict. This principle is fully set forth in an opinion rendered by this department September 2, 1958 to H. M. Hardwicke, M.D., Acting Director, Division of Health of Missouri, a copy of which opinion is enclosed.

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CONCLUSION

It is the opinion of this department that employees of the state, or any department or agency thereof, or of any county, municipality, school district or other political subdivision who are now or who may become members of the National Guard, are entitled to their normal salary in addition to National Guard pay while engaged in the performance of duty in the National Guard for a period not to exceed ten working days in any one calendar year.

It is the further opinion of this department that any city ordinance, whether enacted prior or subsequent to the enactment of Section 105.270, MoRS Cum. Supp. 1957, which provides that such an employee as is referred to above shall receive less than his regular pay for the period referred to above spent in National Guard duty, is in conflict with Section 105.270, supra, and to the extent of the conflict, must fail.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

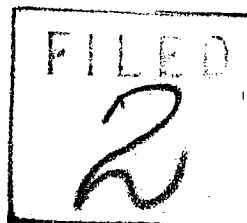
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Enclosure

**TAXATION:
INHERITANCE
TAX:**

State of Israel within terms "persons, institutions, associations or corporations" as terms are found in Sec. 145.020, RSMo Supp. 1957, levying inheritance tax on transfers. Testamentary devises and bequests to State of Israel, without further condition, are transfers solely for charitable purposes within exemption provision of Sec. 145.090, RSMo Supp. 1957, such exemption to be effective only if State of Israel grants a similar exemption.

January 12, 1959

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

This opinion is rendered in reply to the request of your immediate predecessor which posed the following question:

"Is an inheritance tax due under the provisions of Section 145.020, on a transfer to a foreign national state made in the will of the deceased, or is said transfer exempted under provisions of RSMo 145.090."

The language of the will to be considered directed bequests to "the Government of the State of Israel." Section 145.020, RSMo Supp. 1957, imposes an inheritance tax on transfers of property in the following general language:

"1. A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associations or corporations, not herein exempted, in the following cases: * * *."

Section 145.020, supra, from which we have quoted general language, is of considerable length and it is not necessary in this opinion to quote the statute in full. It will suffice to say that the character of the property transferred to "the Government of the State of Israel" in this instance does not release the property from the above quoted general language of the statute levying the inheritance tax. Consequently, we consider one single question at this point, and it may be phrased as follows:

Is the Government of the State of Israel comprehended in the terms "persons, institutions, associations or corporations" as the same are used in the foregoing language quoted from Section 145.020, RSMo Supp. 1957?

Honorable Norman H. Anderson

For the purpose of this opinion, we concede that the State of Israel is a foreign state or nation. The terms "persons, institutions, associations or corporations" as used in Section 145.020, RSMo Supp. 1957, are at most generally descriptive and the statute does not define the terms, consequently, doubt exists as to the full scope of such terms. In such circumstance, we take note of a rule of statutory construction found in the following language from *In re Clark's Estate*, 194 S.W. 54, 270 Mo. 351, 1.c. 362:

"Statutes by which the state taxes the property of the citizens are to be strictly construed. [Blakemore and Bancroft, *Inheritance Taxes*, 32; *Matter of Enston*, 113 N.Y. 174; *Matter of Vassar*, 127 N. Y. 1; 37 Cyc. 1556.] This rule is not, however, to be followed so far and so technically as to defeat the intention of the Legislature. [State ex rel. v. Switzler, 143 Mo. 287.]."

In *Union Electric Co. v. Coale*, 146 S.W.(2d) 631, 347 Mo. 175, 1.c. 183, we find the rule referred to in the following language:

"Also, it must not be overlooked that 'taxing statutes should be construed strictly against the taxing authority unless a contrary legislative intent appears.' [In re *Kansas City Star Company*, supra, 346 Mo. 659, 142 S.W.(2d) 1.c. 1039; *Artaphone Corporation v. Coale et al.*, 345 Mo. 344, 133 S.W.(2d) 343, 1.c. 347.]."

In *State ex rel. Hatten v. Kansas City Power & Light Company*, 281 S.W.(2d) 784, 365 Mo. 296, 1.c. 301, we find the rule alluded to in the following language:

"The rule is that 'taxing statutes are construed strictly in favor of the taxpayer, bearing in mind that they should be applied with due regard to the apparent intention of the Legislature as expressed in the statute, with a view to promoting the apparent object of the legislative enactment.' * * *"

One additional statement of a rule of statutory construction is referred to before proceeding to a discussion of the statutes in question. It is found in the following language from *Powers v. Johnson* (Mo. App.), 306 S.W.(2d) 616, 1.c. 621:

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"In construing two or more statutes relating to the same subject it is the court's duty to read them together and to harmonize them, if possible, and to give force and effect to each."

We now proceed to examine particular statutes in our inheritance tax law found at Chapter 145, RSMo 1949, as amended, in an effort to discover the legislative intent touching the meaning of the terms "persons, institutions, associations or corporations" as the same are used in the first sentence of Section 145.020, RSMo Supp. 1957, heretofore quoted.

The inheritance tax is imposed on the "transfer" of property. Section 145.010, RSMo 1949, defines "transfer" in the following language:

"The word 'transfer' as used in this chapter shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein described."

The foregoing definition of the term "transfer", containing as it does descriptive language of all known methods of transfer of property by a decedent, clearly discloses a legislative intent to tax all transfers of property which may be received by the donee or devisee. We find no provision in the inheritance tax law prohibiting any described person, institution, association or corporation from receiving a "transfer."

Exemptions are common to taxing statutes, and the very nature of exemption statutes demands that they operate only on those who have been subjected to the tax. Consequently, in a tax exemption statute, we are able to discern the legislative intent touching the objects of the tax. A general exemption statute appears in our inheritance tax law as Section 145.090, RSMo Supp. 1957, which provides in part as follows:

"The following are exempt from taxes imposed in this chapter:

* * * * *

(2) All transfers, direct and indirect, including transfers from a trustee to another trustee

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of any property or beneficial interest therein to be used solely for county, municipal, religious, charitable or educational purposes in any other state or territory of the United States, foreign state or nation, which at the time of the death of the decedent imposed no legacy, succession or death tax of any character in respect to property transferred for similar uses in this state, or which by law exempts transfers made for similar uses in this state from all such tax on condition that this state shall exempt transfers made for such uses in such other state, territory or nation from any such taxes imposed by this state."

Language in the exemption provision just quoted from Section 145.090, RSMo Supp. 1957, discloses that the Legislature was cognizant of the fact that direct and indirect transfers of property are made by donors to be used for "county, municipal, religious, charitable or educational purposes" in a foreign state or nation. To effect the exemption implies a prior intent to levy the tax.

Section 145.060, RSMo 1949, sets forth the percentage rates of inheritance tax to be paid. Here we have an instance where the Legislature associates the word "person" with a "body politic" in the following language:

"Where the person to whom such property or any beneficial interest therein passes shall be in any other degree of collateral consanguinity than as herein stated, or shall be a stranger in blood to the decedent, or shall be a body politic, association, institution, or corporation, at the rate of five per cent of the clear market value of such property or interest therein." (Underscoring supplied.)

The legislative intent with reference to the meaning of the word "persons" as used in Section 145.020, RSMo Supp. 1957, has been sought from language appearing in the related statutes of our inheritance tax law. We now seek to cite adjudicated cases wherein the scope of the word "person" may be determined.

In the case of United States v. Cooper Corporation (1940), 312 U. S. 600, the Supreme Court of the United States refused to hold that the United States was a "person" within the meaning of

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the Sherman Anti-Trust Act so as to be entitled to damages for certain breaches of said act. However, in stating the rule to be applied, the Supreme Court of the United States spoke as follows at 312 U.S. 600, 1.c. 604, 605:

"Since in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretations of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

A strong dissenting opinion in United States v. Cooper Corporation, supra, was written by Justice Black. In the course of his dissent, he quoted approvingly from Cotton v. United States and Helvering v. Stockholms Enskilda Bank, the following language found at 312 U.S., 1.c. 619:

"And certainly it can hardly be denied that the language of the Act, giving all persons a right of action, should if liberally construed be held to justify suit by the United States. For in Cotton v. United States, 11 How. 229, 231, decided forty years before the Sherman Act was adopted, this Court said in speaking of the United States: 'Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' And, speaking in similar vein in Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 92, after having cited Blackstone for the proposition that the sovereign is a 'corporation', and after having gone even beyond this to hold that the statutory word 'resident' included the United States, the Court said: 'This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the administration

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of the law when they are required by the demands of convenience and justice."

In the case of Board of Regents U. W. v. Illinois (1949), 404 Ill. 189, we find a testator, a resident of Illinois, bequeathed the residue of his estate to the Board of Regents of the University of Wisconsin. The Illinois Inheritance Tax Act levied the tax on a "person," "institution," or "corporation." The levy of the tax was upheld. In referring to the State of Wisconsin and its instrumentality, the Board of Regents of the University of Wisconsin, the Supreme Court of Illinois spoke as follows at 404 Ill. 193, l.c. 196, 197:

"This legislation presents a clear inference that the State and its instrumentalities are included in the act unless specifically exempted. We find further support in the case of United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. Rep. 1073, which holds the United States is within the word 'corporation' as used in the New York act imposing an inheritance tax upon 'persons' or 'corporations' not exempt by law from taxation. From what we have above pointed out it is apparent that the act applies to the State of Wisconsin or its instrumentalities."

In the case of Board of Regents U. W. v. Illinois, cited above, the Court cited with approval the case of The People v. Richardson (1915), 269 Ill. 275, 109 N.E. 1033. In such case, the Supreme Court of Illinois was construing that State's inheritance tax statute which imposed the tax "upon the transfer of any property by will or by the intestate laws of this State to persons, institutions or corporations not specifically exempted." The property involved was real estate which, under the statute and circumstances, escheated to the county of Jefferson in the State of Illinois. In holding that the county of Jefferson was liable for the inheritance tax, the Supreme Court of Illinois spoke as follows at 269 Ill. 275, l.c. 276, 277:

"It is insisted that the county does not come within the meaning of the statute because it is an involuntary public corporation established as a part of the government of the State; that its property is not private property but public property, and therefore exempt from

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taxation. The word 'corporation,' used in the Inheritance Tax law imposing the tax, is broad enough to include municipal corporations of every character, and the language purports to apply to every corporation not in the statute afterwards exempted. * * * The tax is not a tax upon the property of the county but a limitation upon the county's right to succeed to the title. The right to the amount of the tax vested in the State on the decedent's death, and that amount never became the property of the county. Whether the tax should be imposed upon public municipal corporations was a question for the consideration of the legislature, and no reason exists for giving a construction to the language used different from its natural meaning, which includes such corporations. * * * The tax imposed upon transfers of property by the statute applies to the transfer of the property of an intestate to a county by escheat."

From the foregoing, it must be concluded that the government of the State of Israel is within the terms "persons, institutions, associations or corporations," as the same are used in Section 145.020, RSMo Supp. 1957, and a "transfer" to such foreign state or nation is subject to the inheritance tax as provided by said statute.

We now consider the general exemption statutes of our inheritance tax law to determine if a bequest to "the Government of the State of Israel," as found in paragraphs IV and V of the will in question are exempt from the tax. The bequests made in the will executed on January 10, 1958, contain no directive relative to the use to which said bequests are to be put, but merely bequeath the same "to the Government of the State of Israel."

Our inheritance tax law contains two general exemption statutes. Section 145.100, RSMo Supp. 1957, exempts transfers "to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state," and transfers "to any trustee, association, or corporation, bishop, Minister of any church, or religious denomination in this state to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes," etc. Such exemption statute contains a reciprocity clause applicable to "other states." The transfers in question are obviously not within this exemption

Honorable Norman H. Anderson

statute for the bequests are not made to the persons or institutions therein named, and no uses to which said bequests are made are named.

Section 145.090, RSMo Supp. 1957, is another exemption statute found in our inheritance tax law. The applicable portion thereof reads as follows:

"The following are exempt from taxes imposed in this chapter:

* * * * *

(2) All transfers, direct and indirect, including transfers from a trustee to another trustee of any property or beneficial interest therein to be used solely for county, municipal, religious, charitable or educational purposes in any other state or territory of the United States, foreign state or nation, which at the time of death of the decedent imposed no legacy, succession or death tax of any character in respect to property transferred for similar uses in this state, or which by law exempts transfers made for similar uses in this state from all such tax on condition that this state shall exempt transfers made for such uses in such other state, territory or nation from any such taxes imposed by this state."

In view of the preceding quotation from Section 145.090, RSMo Supp. 1957, may we say that a bequest or gift "to the Government of the State of Israel" is a gift to be used "solely for county, municipal, religious, charitable or educational purposes" as such language is used in the exemption statute? The bequests in question are simply worded and an intention to make the gift solely available to the government of the State of Israel is apparent. The gift is to a government and will, to a greater or lesser degree, lessen the burdens of that government. At this point, we quote from *Salvation Army v. Hoehn*, 354 Mo. 107, 1.c. 114, 188 S.W.(2d) 826, on the question of interpretation of tax exemption statutes:

"The rule of strict construction in the matter of exemption from taxation is not questioned, but 'strict construction must be reasonable construction.'"

Honorable Norman M. Anderson

In *Salvation Army v. Hoehn*, supra, the Supreme Court of Missouri quoted with approval the following language relative to a definition of charity, such language being found at 354 Mo. 1.c. 114, 115:

"Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public." (Emphasis supplied.)

In *Mississippi Valley Trust Co. v. Ruhland*, 359 Mo. 616, 1.c. 622, 222 S.W.(2d) 750, the Supreme Court of Missouri quoted approvingly the following language:

"It may be stated generally that a devise or bequest to a country or political subdivision, which tends to reduce taxation, and lessen the burdens of government, will be held valid as a charitable gift, although no particular purpose is specified."

It must reasonably be concluded that the bequests in question to "the Government of the State of Israel," though no particular use is specified, are to be considered as transfers of property to be used solely for charitable purposes and within the exemption clause found at subparagraph (2) of Section 145.090, RSMo Supp. 1957.

While the transfers of property in question are of a character to become exempt from inheritance tax, such exemption is to be

Honorable Norman H. Anderson

effective only in the event the Government of the State of Israel affords a like exemption to like transfers to the State of Missouri. The burden of proving such exemption is upon those claiming it and they must make their showing to the probate court entertaining jurisdiction of the estate.

CONCLUSION

It is the opinion of this office that the Government of the State of Israel is comprehended in the terms "persons, institutions, associations or corporations" as the same are found in Section 145.020, RSMo Supp. 1957, of Missouri's inheritance tax law and transfers of property, or interest therein, are subject to the tax provided in said statute; and that testamentary devises or bequests "to the Government of the State of Israel," without further condition, are transfers to be used solely for charitable purposes and within the exemption provision of Section 145.090, RSMo Supp. 1957, such exemption to be conditioned upon the fact of the State of Israel affording a similar exemption.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

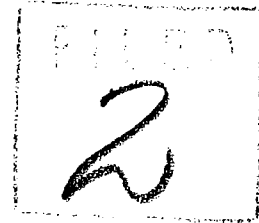
John M. Dalton
Attorney General

JLO'M:cm

CONDEMNATION PROCEEDINGS: Section 523.040 RSMo 1949, requires a
COMMISSIONERS' REPORTS: commissioner's report in a condemnation
RECORDING FEE: proceeding to be recorded, and each tract
WHEN COLLECTED: to be separately indexed in the deed records of the county in which the lands are located. Recording fee shall be taxed as costs, and recorder shall record report without tender or payment of recording fee in advance.

February 2, 1959

Honorable James H. Anderson
Assistant County Counselor
Jackson County
Kansas City, Missouri



Dear Mr. Anderson:

This is to acknowledge receipt of your request for a legal opinion, which reads as follows:

"We have been asked by Mr. Nathan Searritt, Recorder of Deeds of Jackson County, for an opinion concerning a 'Report of Commissioners' appointed for sewer districts, highways, public roads, etc., affecting real property situate in the County of Jackson.

"Under Section 523.040 RSMo 1949, the Recorder of Deeds is required to record in his office a copy of the 'Report of Commissioners' and the fee for so recording shall be taxed by the clerk as costs in the proceedings, and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed.

"However, in Section 59.320 RSMo 1949, it states the recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party required the record to be made.

"In Section 59.440 RSMo 1949, it states in the book to be known as 'The Abstract and Index of Deeds,' among other appropriate columns, a column describing the lands conveyed or affected shall be kept.

"Would you please give us an opinion as to whether a 'Report of Commissioners' shall be recorded and the fee for such recording collected later, and also, whether each tract of land described in the report of the commissioners shall be indexed separately?"

Honorable James H. Anderson

Your inquiry, in reality, is three inquiries, which we have rephrased for convenience of discussion in the following order:

- (1) Shall the commissioner's report in a condemnation suit be recorded?
- (2) If such commissioner's report is required to be recorded, shall each tract described in the report be indexed separately?
- (3) If the commissioner's report is required to be recorded, shall the fee be paid before such recording, or may the recorder collect the fee at a later date?"

All statutory references herein are to RSMo 1949, unless otherwise specified.

Section 523.040 authorizes the court before whom a condemnation suit is pending to appoint appraisers to assess the damages which the owners of real estate may sustain by reason of the appropriation, and reads as follows:

"The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return to the clerk of such court, under oath, their report in duplicate, of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the damages allowed to the owner, owners, claimant or claimants of each tract, respectively, shall be stated separately, together with a specific description of the tracts for which such damages are assessed; and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract

Honorable James H. Anderson

separately as provided in section 59.440, RSMo 1949, and the fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void."

The section imposes the duty upon the clerk of the court in which the condemnation proceedings is pending to file one copy of the report of the commissioners in his office, and to record it in the order book of the court. A second copy, properly certified by him, shall be delivered by the clerk to the recorder of deeds of the county where the land lies, or to the recorder of deeds of the City of St. Louis, if the land lies in said city. Upon receipt of the commissioner's report, the recorder shall record same in his office, and shall separately index each tract, as provided by Sec. 59.440.

In answer to the first inquiry, it is our thought that the report of the commissioners in a condemnation suit shall be recorded by the recorder of deeds of the county in which the real estate described in the report is located.

In answer to the second inquiry, it is our thought that when the recorder records the commissioner's report, he shall index each tract separately, as provided by Sec. 59.440.

In discussing the third inquiry, we refer you again to Sec. 523.040, supra, which specifically provides the fee for recording the commissioner's report shall be taxed by the clerk as costs in the proceeding. Sec. 523.070 provides what parties shall pay the costs in a condemnation proceeding and reads as follows:

"The cost of the proceeding to appropriate the right of way shall be paid by the company seeking the appropriation, up to and including the filing and copying of the report of the commis-

Honorable James H. Anderson

sioners; and the court, as to any costs made by subsequent litigation, may make such order as in its discretion may be deemed just. The court shall allow the commissioners a reasonable compensation for their services, which shall be taxed as costs in the proceedings."

Thus, it is noted from the last-quoted section that the costs of the proceeding, up to and including the filing and copying of the commissioners' report, shall be paid by the applicant for condemnation, and the court may make such appropriate order as he deems necessary, with reference to the payment of costs subsequent to the filing of the commissioners' report. Certainly, the recording of the report would constitute costs up to this point, and the liability for the recording fees would be that of the applicant for condemnation.

The opinion request also calls attention to Sec. 59.320, to the effect that the recorder is not required to record any instrument until the legal fee for recording has first been paid or tendered to the recorder. Said section reads as follows:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

No exceptions of any kind are made in this section, and the general terms used therein are broad enough to include fees for recording commissioners' reports and to require the payment of the fee in advance of recording. If this is the proper construction of the section, then there is a conflict between the provisions of the section and those of Sec. 523.040, supra. Said latter section requires the clerk to tax the recording fee as costs of the proceeding, and that the certified copy of the report shall be forwarded to the recorder of deeds "who shall record the same in his office". The implication is, the fee shall not be paid in advance, even though the liability of the applicant for condemnation is fixed, but is to be paid at a date subsequent to the recording.

In this connection, we call attention to a primary rule of statutory construction, believed to be applicable here, which is, that when two statutes are in conflict they should be harmonized, if possible, so that both may be given effect according to the apparent legislative intent. In the event such statutes are so repugnant to each other they cannot be harmonized, and it appears that one deals with a given subject in a general way, while the

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other deals with a part of the same subject in a more minute and definite way, the latter is a specific statute and its provisions will prevail over those of the general statute. These principles of statutory construction were discussed and followed in the case of Dalton v. Fabius River Drainage District, 219 SW2d 289. The main issue of the case was whether the county collector was entitled to receive a one and three-fourths per cent commission for collecting drainage district taxes under Sec. 11,072, a general statute, or whether the collector was limited to a commission of one per cent under Sec. 12,344 RSMo 1939, a special statute. In discussing the issue, the court said at l.c. 291:

"The one and three-fourths per centum for services under Section 11072 is for collecting the general state, county, school and road taxes, and the fact that that law was enacted in 1915, after the enactment of Section 12344 does not repeal, alter or supersede Section 12344. It has long been the law that 'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' State v. Richman, 347 Mo. 595, 148 S.W.2d 796, loc. cit. 799; State ex rel, Buchanan County v. Fulks et al., 296 Mo. 614, 626, 247 S.W. 129."

In applying the doctrine enunciated in the Drainage District case, it is found that Sec. 59.320 is a general statute and requires the recorder's fee to be first tendered or paid before any instrument is recorded by him. From this section it would appear the fee for recording the commissioner's report should be tendered or paid in advance. Such a construction is in conflict with Sec. 523.040, which requires the recorder's fee to be ~~based~~ as court costs, and implies no such fee shall be tendered or paid in advance. It is believed that the provisions of Sec. 523.040, a special statute, shall govern with reference to the payment of the fee for recording the commissioner's report, over the provisions of Sec. 59.320, a general statute.

Honorable James H. Anderson

Therefore, in view of the foregoing, and in answer to the third inquiry, it is our thought that the recorder is unauthorized to require his fee for recording the report of commissioners in a condemnation proceeding to be tendered or paid in advance.

CONCLUSION

Therefore, it is the opinion of this department that the provisions of Sec. 523.040 RSMo 1949, require the report of commissioners in a condemnation proceeding to be recorded, and each tract described in said report to be separately indexed in the deed records of the county in which such lands are located, and that the fee for recording such report shall be taxed as a part of the costs of the proceeding.

It is the further opinion of this department that it is the duty of the recorder to record the report of the commissioners without the tender or payment of the recording fee in advance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

RECORDER OF DEEDS: Recorder should not refuse to accept plat
on sole grounds that it does not bear signa-
LAND SURVEYORS: ture and seal of a registered land surveyor.

June 23, 1959

Honorable J. A. Appelquist
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri



Dear Sir:

We have your request for an opinion of this office,
which request reads as follows:

"A problem has been called to the attention of this office which appears to concern a matter of first impression in this County and perhaps in this State and the issue is therefore referred to your office for your opinion on the problem.

"The problem is as follows: There has been presented to the Recorder of Deeds of Lawrence County a plat of a subdivision of lots situated within the city limits of the municipality of Aurora, Missouri. Attached thereto in proper form is a dedication and a certificate from the City Clerk reflecting acceptance of the proposed subdivision.

"At this point it should be noted that the plat or survey while prepared and drawn in detail reflecting numbered lots thereof does not reflect thereon the impression of nor is affixed thereto the personal seal and signature of a registered land surveyor.

"The plat itself does not reflect patently that such plat was prepared by a registered land surveyor or by one under the authority and direction of a registered land surveyor.

Honorable J. A. Appelquist

"More specifically, in your opinion should the Recorder of Deeds refuse to admit such plat and refuse to record the same in his office in recognition of the Statutes of Missouri and in particular Chapter 344 and sections thereunder.

"It is apparent from the face of the plat that such plat has not been drawn to a scale nor has there been a scale noted on the plat which doubtless causes the plat not to be sufficient by reason of Section 445.020, however I am still concerned in so far as the intentment of the statute as is required under the new Section 344.120.

"Attached hereto for your examination is a photostatic copy of the plat in question.

"We would appreciate an early reply in this matter as at this writing the Recorder has been advised to refrain from recording same until further advised by your office."

Section 59.330, V.A.M.S., provides, in part, as follows:

"It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices."

"Generally, the duty of the recorder is to receive and file, or receive and record, as the case may be, such instruments, and only such instruments, as by law are entitled to be filed or recorded, and to file or record them in such manner as to serve all the purposes of the law. In the absence of a statute to the contrary, it is not his province to determine whether the parties have made valid instruments or to add notations with respect to their validity." 76 C.J.S., Registers of Deeds, Section 10, page 514.

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The Legislature in Missouri has prescribed certain conditions which must be complied with before a plat may be accepted for recording by a recorder. Among such are those found in Section 445.020, V.A.M.S., and reading as follows:

"Every plat hereafter constructed, which is authorized or required by law to be recorded, or intended to form part of any proceedings for the partition of real estate, shall be drawn to a scale, the scale to be noted on the plat, have written on its face as its title, and show the block, section, United States survey, or part thereof, it purports to represent. If the land platted be less than a whole block, section, or United States survey, the plat shall be corrected in such manner as to show the position of such land relatively to the remainder of the block, section, or United States survey, as the case may be; and if such land be intersected by a quarter-section, section, or United States survey line, such line shall be indicated on the plat and distinguished by suitable words and figures, and shall be done in such manner that the precise location of the land purported to be platted can be determined on inspecting the plat; provided, however, that the provisions of this section shall not apply to any plat issued by authority of the United States, or the state of Missouri."

As you have pointed out, the plat here in question does not meet these requirements, and for that reason alone the recorder would be justified in refusing to accept and record it.

Assuming that this defect might be corrected, the question remains as to the effect and meaning of Section 344.120, V.A.M.S. That section reads as follows:

"It shall be unlawful for the recorder of deeds of any county, or the clerk of any city or town, or the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state, to file or record any map, plat, survey, or other document prepared by any land surveyor, which does not have

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impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom, or under whose authority and direction, the map, plat, survey, or other document was prepared."

That section is a part of the law enacted by the General Assembly to require the registration of land surveyors. Section 344.010, V.A.M.S., a part of the same law, provides:

"For the purposes of this chapter:

"(1) 'Land surveying' means the surveying and measuring of the area of any portion of the earth's surface; locating and measuring the lengths and directions of the boundaries of land, and the contour of the surface thereof; and the plotting of lands, and subdivisions thereof in this state, for compensation in any form or manner;

"(2) A 'land surveyor' is one who surveys land, or who offers his services to the public as a land surveyor or surveyor of land, or who, by advertising or in any other manner whatsoever, holds himself out to the public as being authorized by law to practice land surveying, or to survey land in this state."

Section 344.020, V.A.M.S., provides:

"It shall be unlawful for any person to practice, or offer to practice, or to in any manner advertise or indicate to the public that he is engaged in, or will engage in the practice of land surveying in this state, without first registering with the state board of registration for architects and professional engineers, as a land surveyor."

In none of the provisions of Chapter 344, V.A.M.S., in regulating land surveyors, is there to be found an absolute prohibition against the preparation of plats by a person other than a land surveyor. Section 344.010, supra, defines a "land surveyor" as one who surveys lands, and the same section defines "land surveying" to include "the plotting of lands, and subdivisions thereof in this state, for compensation in any form or manner." These sections clearly do not exclude anyone other than a registered land surveyor from preparing plats. In the absence of any absolute prohibition against the preparation of plats by other than land surveyors, there is no basis for

Honorable J. A. Appelquist

an assumption by the recorder that the plat here involved was of necessity prepared by a land surveyor.

By the same token, the Legislature has not prohibited the recording of plats prepared by a person other than a registered land surveyor. They have provided that a recorder who records a plat prepared by a land surveyor is liable for punishment for a misdemeanor if he records such plat without its bearing the signature and seal of the registered surveyor who prepared the plat. Should a recorder know that a plat tendered to him was so prepared or have reasonable grounds for such belief, he would be justified in refusing to accept it for recording. We perceive, however, no basis for his refusal to accept a plat for recording on the sole grounds that it does not bear the signature and seal of a registered land surveyor.

The case of *In re Mechanics' Bank of Brooklyn*, 156 App. Div. 343, 141 N.Y.S. 473, involved a New York statute which provided that no mortgage should be recorded until the tax imposed by law had been paid. The regulation was promulgated by the State Board of Tax Commissioners to the effect that whenever a recording officer had reasonable grounds to believe that an instrument offered for record was intended to operate as a mortgage, although on its face was to be an absolute conveyance, he should refuse to record it without the payment of the mortgage tax, unless he was furnished by the party offering the same an affidavit that the instrument was not given as a security for the debt or obligation. The bank tendered a deed for record and the register of deeds refused to accept it without either the payment of the tax or the furnishing of the affidavit. In an action for mandamus to compel him to accept and record the deed, the register's return stated that he had reasonable grounds to believe that the instrument was intended to operate as a mortgage security because it came from a bank whose business it was to conduct banking and make loans on collateral and other securities. The court held that the recorder was not authorized to refuse to accept the instrument tendered. The court stated: "Without determining the power of the State Board of Tax Commissioners to prescribe the rule above referred to, if the power exists, the facts here disclosed furnish no ground for its attempted enforcement. Mere suspicion is not synonymous with belief resting upon reasonable grounds. * * * If a state bank could only accept a conveyance of real property by way of security for a loan, there might be some grounds for the position taken by the respondents; but such is not the case."

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In view of the fact that the recorder might subject himself to criminal penalty for recording an instrument prepared by a land surveyor which did not bear the name and seal of the surveyor, the recorder will be justified in making inquiry with respect to the instrument tendered to him, but the mere absence of the seal and signature by and of itself would not, we feel, be a legal basis for his refusing to accept the instrument for recording.

CONCLUSION

Therefore, it is the opinion of this office that a recorder of deeds may not refuse to accept for recording a plat on the sole grounds that it does not bear the signature and seal of a registered land surveyor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

John M. Dalton
Attorney General

RMW:ml:ga

BAIL BONDS:

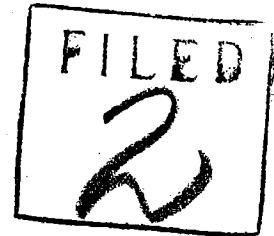
RULES OF CRIMINAL PROCEDURE:

MAGISTRATES:

1. A bail bond need not be presented at the police station nor is it a requirement that the bonded person be taken before the magistrate. 2. The defendant is entitled to release upon approval of the bond. 3. Supreme Court Rule 21.14 requires only one bond. 4. An appearance bond that is issued prior to the actual arrest of the defendant is null and void for the reason that the magistrate is without authority or jurisdiction to require or to fix the defendant's bail.

August 18, 1959

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri



Dear Mr. Anderson:

This is in response to your request for an opinion of May 27, 1959, which we quote:

"I have been requested to obtain an opinion relative to Supreme Court Rule No. 21-14, and other statutes and laws relative thereto, from your office by various law enforcement agencies in St. Louis County.

"The Magistrates in St. Louis County have been issuing 'Appearance Bonds' based upon Supreme Court Rule No. 21.14.

"The following questions have been raised:

- (1) Can the Police carry out 'routine' duties such as fingerprinting and photographing a person after they have received an Appearance Bond?
- (2) On an Appearance Bond should the bond be presented at the Police Station or should the defendant be taken before the Magistrate issuing the bond?
- (3) If a defendant is picked up for investigation on two or more separate crimes, is one bond sufficient for the defendant's release? (Please bear in mind that the bond would read . . . 'to answer any charge preferred. . .')

Honorable Norman H. Anderson

- (4) What is the legal significance of an Appearance Bond that is issued and directed to the Police involved, prior to the actual arrest of the defendant, relative to an investigation for a crime? (This has occurred on occasion when an attorney procures an Appearance Bond for a defendant and then has the defendant surrender himself to the Police. The Police, in this situation, have an Appearance Bond or an order of authority to release the defendant before they actually arrest the defendant.)

"I am enclosing a typical release that is given to the Police as authority to release defendants from custody for the reason that a bond has been signed. I wonder if this is proper procedure and would appreciate any help you might give us in this situation."

Rule 21.14, Rules of Criminal Procedure for the Courts of Missouri, amended April 15, 1958, effective December 1, 1958:

"All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to consult with counsel or other persons in his behalf. If the offense for which such person is held in custody is bailable and the person held so requests, he shall be entitled to be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by all applicable provisions of these Rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place

Honorable Norman H. Anderson

stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him."

We choose to first discuss your second question. Rule 21.14, supra, states that the person to whom Rule 21.14 applies shall be entitled to be admitted to bail in an amount determined sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. It is to be observed that this does not specifically require that the person appear before the judge. We call your attention to the case of State v. Wilson, 175 S.W. 603. The Supreme Court of Missouri in this case discusses the distinction between a recognizance and a bail bond. The court, in paragraph 7, states in part:

"A bail bond is an obligation required under the common law to be under seal, but not so here, where seals have been abolished. It must be signed by the party giving the same, with one or more sureties, under a penalty, conditioned to do some particular thing, usually, as in recognizances, to appear to answer some charge. Its execution, approval, and delivery effect the creation of a contract or debt not of record and give it its binding effect. It may be taken in court or out of court in vacation. An acknowledgment does not add to its effectiveness, and there is nothing in its nature or terms which requires that it should be signed in the presence of the court or officer who takes same to render it valid.
* * *

In paragraph 9 the court states:

"* * * The instrument being in the nature of a bail bond and not a recognizance, the indorsements thereon show that after it was taken and approved by the probate judge it was filed in the office of the circuit clerk, where the criminal case against the principal was pending. Being in other respects in compliance with the law, this was all that

Honorable Norman H. Anderson

was necessary to render it effective and binding upon the parties thereto."

We think that the law does not require that the bond be presented at either the police station nor that the defendant be taken before the magistrate issuing the bond. It is apparent from the cited case that the bond need only be properly executed and approved by the judge. This would be sufficient to render the bond effective and binding upon the parties thereto. A previous opinion of this office to Robert Lamar, Cabool, Missouri, on September 8, 1955, is not inconsistent with this position. It was the conclusion of that opinion that one arrested without a warrant may not be admitted to bail except by the judge or magistrate under the provisions of Rule 21.14, supra. However, this opinion does not state that it is necessary that the bonded person appear before that judge or magistrate to get his bond. We enclose a copy of that opinion. We also wish to bring to your attention the case of Ewing v. United States, 240 Federal Reporter 241, Circuit Court of Appeals, Sixth Circuit.

It is our belief that the answer to the above question necessarily carries with it the answer to your first question. Since there is no requirement that the bail bond be presented at the police station, it would appear that a person is entitled to his release when a properly executed bail bond has been approved.

With respect to your third question, it is our opinion that Rule 21.14, supra, authorizes the issuance of one bond, the condition of which shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him. The assurance of his appearance to answer such charges that may be preferred against him is the purpose of the bond. It would be unreasonable to assume that he should be required to provide a separate bond for each charge which the police might make against him prior to his appearance in the court having appropriate jurisdiction. Therefore, under Rule 21.14, supra, we feel that one bond is sufficient for the defendant's release.

In answer to your fourth question, from the facts which you have given us, it would appear that unless the defendant has been arrested no court would have appropriate jurisdiction permitting it to approve or sanction an appearance bond. We bring your attention to State v. Fleming, 227 S.W. 2d 106, Kansas City

Honorable Norman H. Anderson

Court of Appeals, February 6, 1950. In this case the court considers the situation in which the defendant had been in custody three days after his arrest, awaiting the filing of a complaint and thereafter for fifteen days without any proper warrant based on the complaint filed. The court held that without lawful custody of the defendant at the time the recognizance was executed the magistrate was without authority or jurisdiction to require or to fix his bail or to receive the recognizance, which was therefore null and void. It is our belief that the law set forth in this case is pertinent to the problem which you present. It is our opinion that an appearance bond that is issued and directed to the police involved prior to the actual arrest of the defendant is null and void.

It would seem that the manner in which the police are notified of the effectiveness of a bond should be a matter for local procedure. It should be noted from the above that it is not required that the bond itself be presented at the police station. It would seem that any reasonable procedure, consistent with the rights of the defendant, for notifying the police to release said defendant would be appropriate.

CONCLUSION

It is the opinion of this office that:

1. A bail bond issued pursuant to Supreme Court Rule 21.14, Rules of Criminal Procedure for the Courts of Missouri, amended April 15, 1958, effective December 1, 1958, need not be presented at the police station, nor is it a requirement that the bonded person be taken before the magistrate issuing the bond.
2. The defendant for whom the bail bond has been executed pursuant to Rule 21.14, supra, is entitled to release when the properly executed bond has been approved.
3. It is only necessary that one bond be provided, as set forth above, pursuant to Rule 21.14, supra.
4. An appearance bond that is issued prior to the actual arrest of the defendant is null and void for the reason that the magistrate is without authority or jurisdiction to require or to fix the defendant's bail.
5. Methods of notification to the police that a bail bond

Honorable Norman H. Anderson

has been properly executed are a matter for local procedure.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc
Enclosures

CITIES, TOWNS AND VILLAGES: Described financial statement does not meet requirements of Section 79.160, RSMo 1949.

August 24, 1959

*See Statement of
General Eagleton Mo
to Mo. Press Assn. 10-20-61
attached*



Honorable Robert B. Baker
Prosecuting Attorney
Reynolds County
Ellington, Missouri

*Also see letter of Eagleton
to Hon W.D. Habler, March 19, 1962*

Dear Sir:

The following opinion is rendered in reply to your inquiry reading as follows:

"The city of Ellington, Missouri proposes to publish the semi-annual financial statement required by VAMS 79.160-165 in a short form. Is there any form less than 'a full and detailed account and statement of the receipts and expenditures and indebtedness of the city' which will comply with these statutes?

"It is my understanding that you may have written an opinion for other fourth class cities on this question. If so, a copy of this previous opinion should be sufficient with an indication that it applies to the instant situation."

In this opinion we are treating a specific financial statement of the city of Ellington, Missouri, a Fourth Class city. The statement is here quoted in its entirety:

"FINANCIAL STATEMENT

Of the City of Ellington, Mo., for period from Dec. 31, 1958 to June 30, 1959.

Honorable Robert B. Baker

GENERAL REVENUE FUND

Balance in Treasury, Dec. 31,
1958 ----- \$ 2,109.95

<u>Source of Receipts</u>	<u>Amount</u>
Water collections and meter deposits, taxes, etc. -----	\$ 6,128.93
Night Marshall collections ---	372.00
Fines -----	120.50
Gravel Hauled and Ditch Digging -----	154.00
Sale of City Lots -----	6,310.00
Loans -----	3,450.00
Insurance Check for Property Damage -----	78.95
Balance of Deposit on Case No. 729 -----	3.00
Check taken up -----	2.00
County Aid for City Street Work -----	300.00
	<u>\$19,029.33</u>

EXPENDITURES -
GENERAL REVENUE FUND

Transfer of Funds - pro rate water collections	\$ 9,905.00
Salaries -----	1,160.00
Stationery and printing -----	275.56
Labor -----	646.75
City Street Lights -----	878.88
Gas, Oil, Labor and Supplies for City Vehicles -	451.19
Payments and Interest on Loans -----	2,846.47
Telephone Service -----	41.95
Equipment -----	1,300.00
Fuel -----	24.00
Surveying -----	222.00
Attorney Fee -----	75.00
Miscellaneous -----	156.64
TOTAL EXPENDITURES -----	<u>\$17,983.44</u>

Honorable Robert B. Baker

Total Receipts Plus Balance --	\$19,029.33
Balance in Treasury	
June 30, 1959 -----	1,045.89

Total Indebtedness from	
General Revenue -----	3,100.00

DONALD HOWARD, Mayor
RUTH LONG, Treasurer

MUNICIPAL WATERWORKS FUND

Balance in Treasury	
Dec. 31, 1958 - (Overdrawn) \$	3.49
Receipts - Transfer of Funds --	<u>9,905.00</u>
Total Receipts less	
Overdraft -----	\$ 9,901.51

**EXPENDITURES -
MUNICIPAL WATERWORKS FUND**

Salaries -----	\$ 637.70
City Pump Power -----	626.04
Labor -----	903.80
Supplies (Pipe Line to Factory Site) -----	7,342.09
Interest on Bonds -----	305.55
Freight -----	18.94
Printing -----	40.00
TOTAL EXPENDITURES -----	<u>\$ 9,874.12</u>
Total Receipts	
less Overdraft -----	\$ 9,901.51
Balance in Treasury	
June 30, 1959 -----	27.39

Total Indebtedness of	
Municipal Water Dept.	
(City Well No. 270)	\$12,000.00

DONALD HOWARD, Mayor
RUTH LONG, Treasurer"

Honorable Robert B. Baker

Section 79.160, RSMo 1949, applicable to cities of the Fourth Class, provides:

"The board of aldermen shall semiannually in January and July of each year make out and spread upon their record a full and detailed account and statement of the receipts and expenditures and indebtedness of the city for the half year ending December thirty-first and June thirtieth, preceding the date of such report, which account and statement shall be published in some newspaper in the city." (Emphasis supplied)

Admittedly, the foregoing statute does not lay down a rule by which we may determine what the legislature meant by the words "full and detailed" when describing the financial statement. We then must take note of the following language found at Section 1.090 RSMo, Sup. 1957:

"Words and phrases shall be taken in their plain or ordinary and usual sense but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

In the light of the statutes quoted above we must look for a reasonable rule to follow. In *State ex rel. McKinney v. Commissioner of Washington County*, 47 N.E. 565, the Supreme Court of Ohio was construing a statute of that State requiring that the county commissioners should make a "detailed report" of their financial transactions, and the Court spoke as follows at 47 N.E. 565, 1.c. 568:

"Doubtless an account or report which gave the most minute circumstances of a transaction, or resolved into its ultimate component parts every composite item, would properly fall within the definition of a detailed account or report; but the common acceptation of the term, as applied to the ordinary transactions of mankind, denotes also a much less specific and extended subdivision of a transaction. * * * It advised the taxpayers of the county of the several

Honorable Robert B. Baker

subjects to which the public revenue had been devoted, and the amount expended upon each subject; and this, we think, is all that the statute requires."

From an examination of the financial report quoted in the forepart of this opinion it can readily be determined that it does not descend into reasonable detail with reference to the items mentioned. The item touching receipts growing out of "water collections and meter deposits, taxes, etc.," commingles three separate items of receipt without disclosing the gross or net pertaining to any of the three items. "Night Marshall collections" gives no evidence as to the purpose of such collections -- whether authorized by ordinance or statute. We may assume that "fines" is an item reporting collections resulting from violations of city ordinances. The item denoted "salaries" in expenditures gives no evidence as to what persons were paid or how much, and this item is of the utmost concern to taxpayers viewing the report. It is not necessary to extend the discussion touching the indefiniteness of other items mentioned in the financial statement, but it will suffice to say that the statement does not descend into reasonable detail on the majority of items, commingles other items in such a manner as to make their individual character incapable of discernment, and as a whole does not advise the taxpayers of the city of the several subjects to which the public revenue has been devoted, or of the amounts spent on the individual subject items.

CONCLUSION

It is the opinion of this office that the "financial statement" referred to in the foregoing opinion does not meet the requirements of Section 79.160 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

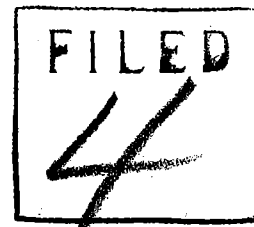
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SPEED LIMIT:
MOTOR VEHICLES:
MUNICIPAL SPEED LIMIT:

1. The speed limit on an undivided Federal highway traveling through a municipality that has properly enacted a 30 miles per hour speed limit is 30 miles per hour, and the violation of this speed limit is a municipal offense. 2. The driver of any motor vehicle other than an emergency vehicle who drives in excess of 70 miles per hour by day or 65 miles per hour by night on an undivided Federal highway through a municipal area which has a speed ordinance is guilty of a misdemeanor under state law. 3. The operation of a motor vehicle at speeds of up to the maximum allowed by state law are not always authorized through a municipal area under state law when the situation requires a lower speed for careful and prudent operation in the highest degree of care.

September 21, 1959

Honorable Henry Balkenbush
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Sir:

You recently asked for an opinion as follows:

"The undersigned desires to have the benefit and advice of the learning and experience of your staff in interpreting Section 304-10 Revised Statutes of Missouri supplement 1957, particularly subsection 3.

"In any city or town, village where the speed limit is not set by local authority, no vehicle shall be operated at a speed of excess of 45, miles per hour.

"This is my question, does this section intend to adopt or does it by implication the speed limit of the city of Linn, Missouri, which has by ordinance been at 30 miles per hour for more than 20 years and is posted by signs of the State highway department. If it does not, then in that event leave the highway traversing through the City of Linn wholly without any speed regulation other than that set out in subsection 1, of Section 304-010, or does the speed limit of 45 miles per hour apply, or is there any speed limit at all."

We take your question to be: What is the speed limit on an undivided Federal highway running through a municipality where the municipal corporation has by ordinance decreed a

Honorable Henry Balkenbush

speed limit of 30 miles per hour?

In order to properly answer your request, it is necessary to construe Section 304.010, RSMo Cum. Supp. 1957. The first four numbered paragraphs read as follows:

"1. Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person.

"2. Except as otherwise provided by law no vehicle shall be operated in excess of

(1) Seventy miles per hour on any divided federal highway or, when lighted lamps are not required by law, on any other federal highway;

(2) Sixty-five miles per hour on any other road or highway in the state when lighted lamps are not required by law;

(3) Sixty-five miles per hour on any undivided federal highway when lighted lamps are required by law;

(4) Sixty miles per hour on any other road or highway in the state when lighted lamps are required by law.

"3. In any city, town or village where the speed limit is not set by local authority, no vehicle shall be operated at a speed in excess of forty-five miles per hour. All ordinances of cities, towns or villages, regulating the speed of vehicles on major state highways shall be designed to expedite the flow of traffic thereon to the extent consistent with public safety.

"4. The limits on speeds set by this section do not apply to the operation of any emergency vehicle as defined in section 304.022. Nothing in subsections 2 and 3 shall make the speeds prescribed therein lawful in a situation that requires lower speed for compliance with the basic rule declared in subsection 1."

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This is a penal statute and, therefore, it is generally conceded under the law to be strictly construed against the state. It is not necessary, however, to overlook the legislative intent in the construction of criminal statutes. Our court said in the case of State v. Ballard, 294 S.W. 2d 666, 669 [1-4]:

"[1-4] Without losing sight of the established rule that criminal statutes must be strictly construed, we must look to the end sought to be accomplished, or evil sought to be suppressed in interpreting the intention of the legislature in the enactment of the statute under consideration. The rule of strict construction is not violated by according the language used by the legislature its full meaning in support of the policy and aim of the enactment. The rule does not compel a narrow or forced construction, out of harmony with the manifest purpose and intent of the statute or one which would exclude cases from it that are obviously within its provisions."

The above is a St. Louis Court of Appeals decision.

The Federal Court of Appeals in the case of Cofer v. United States, 256 F.2d 221, 223 [6,7] said in part:

"* * * even penal provisions must be "given their fair meaning in accord with the evident intent of Congress." "

In the light of the above-cited authority we now view your question.

Paragraph three of Section 304.010, supra, prescribes a speed limit of 45 miles per hour in any town, city, or village, where the speed limit is not set by local authority. Under the facts given us, the speed limit through the town of Linn is set at 30 miles per hour by local authority and, therefore, the 45 miles per hour provision above referred to is not applicable. Any operation in excess of 30 miles per hour would be in violation of the municipal ordinance. A violation of the municipal ordinance, however, is not a crime in the usual sense of the word. A violation of municipal ordinance is handled by the municipal court, not by the magistrate court. This fact does not prevent the filing in magistrate court of a state charge if one should properly arise out of the facts surrounding the municipal charge, and all of the other provisions in the statutes

Honorable Henry Balkenbush

prescribing the method of operation of a motor vehicle, such as are found and contained in the general rules of the road, apply in cities. The fact that a municipal charge is filed does not preclude the state from filing a proper state charge. In *State v. Garner*, 226 S.W. 2d 604, 609 [12], the court says:

"[12] The 9th assignment is that appellant in this State prosecution was twice put in jeopardy on the same facts, because he had also been prosecuted on them in the City courts. Under the general rule here and elsewhere this does not constitute double jeopardy, because the two jurisdictions are different, and a prosecution under a municipal ordinance is generically civil and not criminal."

We feel that your request also raises the question as to the applicability of paragraph two, Section 304.010, supra, which sets forth state speed limits on operation of a motor vehicle as to the town of Linn. The state speed limit was obviously designed to prevent the operation of motor vehicles on the highways in this state at over the prescribed maximum speeds. It was designed to set a limit on the speed the general traveling public may go regardless of whether or not good road conditions might conceivably make a higher rate of speed proper for the safe operation of a motor vehicle. In other words, we feel that the legislature intended the speed limits set forth in paragraph two of Section 304.010, supra, as a maximum in all instances for the general traveling public. You will note that the first part of paragraph two says, "Except as otherwise provided by law no vehicle shall be operated in excess of". The only provision for operation at a higher rate than the rate prescribed is found in paragraph four of Section 304.010 which exempts emergency vehicles from the speed limit.

It is our view that the legislature intended that no vehicle should be operated at a speed of over 70 miles per hour on undivided Federal highways in this state in the daytime or over 65 miles per hour at night unless these vehicles are emergency vehicles as defined in the law.

We feel that even though the 45 mile an hour provision does not apply in towns and villages where the speed limit is set by municipal ordinance, the 70 miles per hour regulation above referred to does apply as a matter of state law. It seems

Honorable Henry Balkenbush

to us that the legislators intended this section to be an absolute maximum in every case except for emergency vehicles. Therefore, a person who operates in excess of 70 miles per hour in the daytime on an undivided Federal highway through a municipality could properly be charged with speeding under the terms of Section 304.010, supra. Such a person could also be charged with the municipal violation for operation in excess of the municipal speed regulation.

In passing, we call your attention to paragraphs one and four of Section 304.010. These paragraphs make it clear that speeds up to the maximum are not always authorized if a situation requires that the vehicle be operated at a lower speed for careful and prudent operation with the highest degree of care.

CONCLUSION

It is the opinion of this office that:

1. The speed limit on an undivided Federal highway traveling through a municipality that has properly enacted a 30 miles per hour speed limit is 30 miles per hour, and the violation of this speed limit is a municipal offense.

2. The driver of any motor vehicle other than an emergency vehicle who drives in excess of 70 miles per hour by day or 65 miles per hour by night on an undivided Federal highway through a municipal area which has a speed ordinance is guilty of a misdemeanor under state law.

3. The operation of a motor vehicle at speeds of up to the maximum allowed by state law are not always authorized through a municipal area under state law when the situation requires a lower speed for careful and prudent operation in the highest degree of care.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

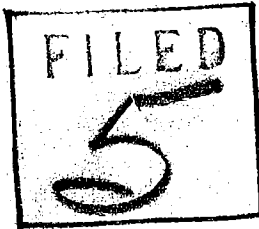
Yours very truly,

JOHN M. DALTON
Attorney General

JEC:mc

PUBLIC ADMINISTRATORS:
PRIVATE PATIENTS
STATE HOSPITALS:

It is the opinion of this department that a public administrator who in the course of his official duty becomes the guardian of an insane person and curator of such person's estate and who places such person in a state hospital as a private patient is not required to give the maintenance bond provided for in Section 202.863, RSMo Cum. Supp. 1957, because of the fact that the official bond given by him as public administrator covers such a situation



January 22, 1959

Alfred K. Baur, M. D.
Superintendent
State Hospital No. 1
Pulton, Missouri

Dear Dr. Baur:

I have your letter of October 7, 1958, in reference to my letter to you of September 30, 1958, which was a reply to your letter to me of September 26, 1958. I have noted the copy of the letter dated October 3, 1958, to you from Walter Stilwell of Hannibal.

It is my impression that the first question which you raised with respect to the admission of private patients to state hospitals had to do with a situation where private individuals sought to have a person committed as a private patient. With respect to that situation, we stated that we felt that Sections 202.863 and 867, RSMo Cum. Supp. 1957, should be followed. That is our continued opinion.

Your latest inquiry, based upon the Stilwell letter, is whether the bond provided for in Section 202.863, supra, must be given when a public administrator applies for and is given leave to have admitted to a state hospital as a private patient an insane person who has been committed to the custody of the public administrator. In respect to this matter, we would first call attention to Section 473.743, RSMo Cum. Supp. 1957. That section reads in part:

"It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases:

* * * * *

(8) The estates or person and estate of all insane persons in his county who have no legal guardian, and no one competent to take charge

Alfred K. Baur, M. D.

of such estate, or to act as such guardian, can be found, or is known to the court having jurisdiction, who will qualify;"

From the above, it will be seen that it is the official duty of the public administrator to take into his charge and custody, whenever the situation arises, the person and estate of an insane person where such person has no legal guardian. When such has occurred and it is proposed to admit such person to a state hospital as a private patient, the question arises as to whether or not the public administrator must give the bond provided for in Section 202.863, RSMo Cum. Supp. 1957. Numbered paragraphs 1 and 2 of Section 202.863, supra, reads:

"1. Patients admitted to the state hospitals under the provisions of this law shall be classified as private patients or as county patients.

2. When admission is sought for any person as a private patient, payment for care and treatment shall be made to the business manager of the hospital for thirty days in advance and a bond executed in sufficient amount to secure the payment for such care and treatment. No part of the advance payment shall be refunded if the patient is taken away within such period uncured and against the advice of the superintendent."

Section 202.867 sets forth the form of such bond as is provided for in Section 202.863.

If a public administrator has to comply with the above sections, then he finds himself in the position of having to give a personal bond and to obligate himself personally to guarantee the maintenance of his insane ward at a state hospital and, in the event that the estate of the insane ward fails entirely or becomes insufficient to pay the full amount of such maintenance, then to be obligated to pay all or whatever part of such maintenance as is required out of his private means. We cannot believe that such was the intent of the law because if such a requirement were placed upon a public administrator, it would create extreme hardship and would in many situations make the office of public administrator wholly untenable. Neither do we believe that it was the intention of the law that the public

Alfred K. Baur, M. D.

administrator be required to attempt to find private individuals who would sign such a maintenance bond and in the event of his failure to find such persons to sign the bond himself. We believe that the contrary is clearly indicated in Section 473.730, RSMo Cum. Supp. 1957, which reads:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and such court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

From the above, it will be noted that the bond is given and conditioned that the public administrator "will faithfully discharge all the duties of his office * * *." Since it may be the duty of the public administrator, as guardian, to have his ward admitted to a state hospital as a private patient, we believe that the bond of the public administrator covers the costs thereof to the full extent of the estate of the ward and that the public administrator is not required to give the bond provided for in Section 202.863, supra. The public administrator is not required to assume personal liability for the care of the ward.

Alfred K. Baur, M. D.

CONCLUSION

It is the opinion of this department that a public administrator who in the course of his official duty becomes the custodian of an insane person and curator of such person's estate and whose ward is admitted to a state hospital as a private patient is not required to give the maintenance bond provided for in Section 202.863, RSMo Cum. Supp. 1957, because of the fact that the official bond given by him as public administrator covers such a situation.

The foregoing opinion which I hereby approve was prepared by my assistant, Hugh P. Williamson.

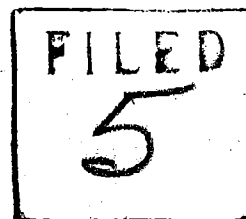
Yours very truly,

John M. Dalton
Attorney General

HPW:GD

BANKS: Sec. 362.105, RSMo 1949, is authority for a state
CORPORATIONS: chartered bank in Missouri to acquire by purchase
the capital stock of a corporation organized to
construct a bank building to be leased to the state
chartered bank for its banking facilities.

April 8, 1959



Honorable G. H. Bates,
Commissioner,
Division of Finance,
Jefferson Building,
Jefferson City, Missouri.

Dear Mr. Bates:

This opinion is in answer to your request of March 10, 1959, in which you desire an opinion on the question we restate in the following language:

"May a state chartered bank acquire by purchase the capital stock of a corporation organized to construct a bank building to be leased to the state chartered bank for its banking facilities?"

The Missouri Constitution of 1945 contains no express restrictions on banking corporations, as such, however, under Article XI, applying to corporations generally, there is a restriction on the holding of real estate by corporations which is applicable to banking corporations. We quote from Article XI, Section 5, in part:

"Sec.5. Prohibition of ultra vires acts - limitations on holding of real estate.-- No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; * * * "

It can readily be seen that our Constitution expressly allows a corporation to hold title to real estate to enable it to carry on its purposes which would, of course, include ownership of the building housing its banking offices.

This premise is specifically confirmed by statute. Section 362.105, RSMo 1949, captioned "Rights and powers of banks -." In part, this provision reads:

Honorable G. H. Bates

"Every bank shall be authorized and empowered

* * * * *

"(6) To purchase, hold or convey real property for the following purposes:

"(a) A plot whereon there is or may be erected a building or buildings suitable for the convenient transaction of its business, from portions of which not required for its own use a revenue may be derived; * * * "

Restrictions contained in Section 362.165, RSMo 1949, on holding real estate by banks specifically exempts real estate held for the purpose of housing its regular banking operations.

Thus, it is plain that there is clearly no prohibition against a bank holding real estate directly to house its banking quarters. Accordingly, we next pass to the question of possible prohibitions against this purpose being effected indirectly by the means of the wholly owned subsidiary.

Section 362.105, RSMo 1949, which has been quoted in part, supra, and which grants the general authorized powers of banks, contains no direct prohibition against a bank purchasing stock of corporations but, to the contrary - in subsections (3), (4) and (5) of that section - provides that a bank may hold stock in a federal reserve bank, the Federal Deposit Insurance Corporation and certain safety deposit companies, respectively. Other statutes which provide for the acquisition of certain approved stock by banks are: Section 362.140, RSMo 1949, which provides that Missouri banks may invest in stock of other banks for the purpose of establishing foreign branches; Section 362.160, RSMo 1949, to deal in and develop foreign exchange.

These, then, are the only sections of the Missouri statutes specifically allowing purchase of stock by banks.

There has been a clear legislative pronouncement against banks entering into fields other than banking, as embodied in Section 362.200, RSMo 1949, which provides:

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"No corporation now existing, nor any hereafter organized under any law of this state, whether general or special, as a bank, or to carry on a banking business, shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling ordinary goods, chattels, wares and merchandise, or by owning or operating industrial plants; provided, that it may sell all kinds of property which may come into its possession as collateral security for loans or in the ordinary collection of debts."

Note that while Section 362.200, RSMo 1949, does not purport to affect the purchase of stock by banks, its implication, considering it with the other sections noted, supra, which provide that banks may acquire certain stocks by clear public policy in favor of their acquisition, is that stock may be acquired for certain recognized policies which effectuate the bank's business or public policy. It may not purchase stock for the purpose of speculation or actively engaging in activities other than banking. This, of course, would also prohibit banks from purchasing stock in a corporation whose general purpose it was to deal in real estate.

This philosophy is reflected in the Missouri decisions on the subject of acquisition of stock of other enterprises by banks. See *City of Goodland v. Bank of Darlington*, 74 Mo. App. 365, wherein it was stated concerning acquisition of stock in other enterprises by banks, l.c. 369:

" * * * It is a matter of common knowledge of which we may take notice, that banks of deposit or discount or of both deposit and discount organized under the statute of this state in the course of their regular business often take as collateral security for loans made by them the stocks of other corporations the absolute title of which they are frequently compelled to acquire in order to protect themselves; and in this way their funds become invested in such stocks. The statute has been made sufficiently comprehensive in its terms to

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enable such banks, in making their official statements, to include such stocks among their resources. But we do not understand that this or any other statute authorizes any banking corporation organized under the statute of this state to subscribe for the stock of any other corporation or to primarily invest its funds therein. * * *

Since this is a question of original impression in Missouri and there is no direct Missouri authority available on the question of acquisition of stock to further the purchase or lease of a bank's business quarters, we have examined other authorities to ascertain whether such practice has ever been upheld.

Decisions under the National Bank Act indicate that national banks have been allowed to hold real estate through a subsidiary corporation. See *Nashville Fourth National Bank v. Stahlman*, 1915, 132 Tenn. 367, 178 S.W. 942, L.R.A. 1916A, 568, quoted *infra*.

Likewise, national banks have the power to lease office facilities. It was said in *Brown v. Schleier*, Colo. 1932, 118 Fed. 981, at page 983, 55 CCA 475, affirmed 24 S. Ct. 558, 194 U.S. 18, 48 L. Ed. 854:

" * * * That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the language of the statute, and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in

Honorable G. H. Bates

a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.
* * *

All of the above cases were decided under that portion of Section 29 of Title 12, U.S.C.A., reading as follows:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business."

The Fourth National Bank v. Stahlman, noted supra, is a leading case on the question of a bank controlling its real property through investment in a corporation for that purpose. We now quote from the majority opinion of that case, 178 S.W. 942, 1.c. 946, 947:

"The proposition is undisputed that one corporation cannot invest its money in the stocks of another corporation, as a general proposition, but this is on the ground that it is unlawful as tending toward monopoly, or as being speculative and outside the scope and purpose of its organization, and not permitted as a matter of public policy.

* * * *

"The object of the restrictions on a national bank to hold real estate or to become interested therein is to keep the capital of the bank flowing in daily channels of commerce; to deter it from engaging in hazardous real estate speculations; and to prevent the accumulations of large masses of such property in its hands to be held as it were in mortmain. The intent, not the letter, of the statute, constitutes the law.

* * * *

Honorable G. H. Bates

"The bank could have built an office building in order to provide a banking home; why could it not effect the same purpose by expending a small fraction of the necessary money, paying a reasonable rental thereafter? Suppose it had built the entire structure. It appears that the investment has not paid dividends, and the stock is quoted at only about 50 cents on the market. It did a more businesslike thing. It conserved its resources for doing a banking business instead of embarking in a course of extravagant building.

* * * *

"A national bank cannot buy real estate not needed in its banking business because the statute creating it has not permitted, on grounds of public policy, so as to confine its operations within the channels so much needed in the world of finance, and to render it at all times a purely banking institution. No reason has been suggested, and we believe none can be, why a national bank should not be permitted to own a small minority of stock in a building concern in order that it may better its own condition and render it a greater institution for the purposes of its creation. The reasons back of those cases cited by appellant, holding the acts of banks and other institutions ultra vires, are wholly wanting. This stock was taken as a business measure to get the best banking house possible, in the most reasonable way, as seen by its officials.

"If a national bank can buy expensive real estate in a banking district, where real estate is costly, and then, in order to so use its property as to make it a paying proposition instead of a losing one, as it can clearly do under the well-settled Federal authorities, we see no reason why its officials may not be permitted a reasonable discretion in doing a lesser act, to take reasonable stock to get a desirable banking home. If it may build or lease a structure for that purpose, why may it not take a smaller interest, such as undivided interest, or subscribe for stock, in order to reach the same result?

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"We therefore conclude that the chancellor did not err in holding that the contract of Stahlman to purchase this \$45,000 of Mecklenburg stock was not ultra vires the bank, illegal, against public policy, void, and unenforceable."

As has been pointed out, there seems to be no direct prohibition in Missouri against a bank effectuating the housing of its banking establishment through the medium of a corporation for that specific purpose. Conversely, there is also no direct authority, either statutory or by court decision, that they may do so. Accordingly, let us look to the Missouri authorities on express and implied powers of corporations to see whether such authorities add anything pertinent to the question at hand - whether a bank may hold its land through a subsidiary corporation.

Note again, the portion of Section 5 of Article XI, Constitution of Missouri, 1945, quoted on page 1 of this opinion, indicates that corporations' powers are restricted to the purposes set forth in their charter. However, it is a familiar principle of constitutional law that express powers carry with them implied powers to do those things necessary to effectuate their purposes.

The Missouri Supreme Court elaborated on this doctrine of implied powers in *State ex inf. Harvey v. Missouri Athletic Club et al.*, 261 Mo. 576, 100 S.W. 599, 170 S.W. 904, as follows:

"But the implied powers are of moment. They are defined to be those possessed by a corporation not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient and suitable for that purpose, including, as an incidental right, a reasonable choice of the means to be employed in putting into practical effect this class of powers."

These doctrines were applied to banks in *Mutual Bank and Trust Co. v. Shaffner*, 1952, 248 S.W. 2d 585, at 589, as follows:

"The plan is based upon principles consonant with long established banking methods and recognized insurance practices. It is not inherently wrong. It neither violates the law nor contravenes public policy. It

Honorable G. H. Bates

appears to be an appropriate, businesslike means of the exercise of the bank's powers."

CONCLUSION

It is the opinion of this office that Section 362.105, RSMo 1949, outlining the basic corporate powers of banks, impliedly authorizes a state chartered bank in Missouri to acquire by purchase the capital stock of a corporation organized to construct a bank building to be leased to the state chartered bank for its banking facilities.

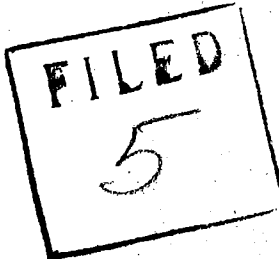
Very truly yours,

John M. Dalton
Attorney General

JBB:lc;ml

SPECIAL ROAD DISTRICTS:
ROADS AND BRIDGES:
TAXATION:
ASSESSMENTS:

(1) The special tax authorized by a vote of the residents of the LaMonte Special Road District on March 24, 1959, should not be levied by the county court. (2) The cash balance, remaining after the affairs of the LaMonte Special Road District have been wound up and all obligations have been discharged, shall be deposited as general revenue for class 3 funds.



September 1, 1959

Honorable Harold W. Barrick
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Barrick:

We have received your request for an opinion of this office, which request reads as follows:

"I herewith request an opinion from your office on the following situation:

"The LaMonte Special Road District was a town road district incorporated under Chapter 233, Sections 233.010 to 233.165, inclusive. Pursuant to statutory authority on March 24, 1959, a special election was held within said Road District for the purpose of voting a road tax of 35¢ in excess of the statutory authorization. By a vote of 20 to 3 against, said special tax was approved. This tax was to be applied and collected in 1959.

"Subsequently on June 23, 1959, pursuant to a petition duly filed and order of the County Court being duly made and notice duly posted, an election was held at which the question of dissolution of the Special Road District was presented to the voters. The proposition of dissolution of the district carried by a vote of 172 for dissolution to 51 against dissolution. The commissioners of the Road District then delivered all assets of the District including the cash on hand to the County Court of Pettis County. I would appreciate having your opinion upon the following questions:

Honorable Harold W. Barrick

"1. Is the money which was delivered to the County Court by the commissioners of the Special Road District to be entered as general revenue for Class 3 funds of Pettis County, or shall the funds be held separately for expenditure on roads within the boundaries of the Special Road District when in existence?

"2. If any of the funds turned to the County Court are to be held separately what percentage of the funds shall be so held in view of the fact that the statutory road tax is equal to the tax in excess voted for in 1958?

"3. Is the tax of 35¢ on the \$100 valuation voted at the special election of March 24, 1959 to be levied and collected in view of the subsequent dissolution of the Special Road District?

"4. If said special tax is to be levied and collected, what shall then be done with the money raised by said tax? Shall it be placed in Pettis County Class 3 general revenue or shall it be held separately for expenditure within the boundary of the Special Road District as it previously existed?

"I will appreciate hearing from you on this matter."

You advise that on March 24, 1959, LaMonte Special Road District voted the special tax authorized by Section 137.565, RSMo 1949, to be levied and collected in 1959. Subsequently, on June 23, 1959, an election was held to vote upon the proposition of dissolving the LaMonte Special Road District and the vote was in favor of dissolution. You further advised that LaMonte Special Road District was organized under Sections 233.010-233.165, RSMo 1949. In a telephone conversation subsequent to our receiving the request, you stated that immediately after the election the commissioners turned the books and all assets of the road district over to the county court.

We are enclosing herewith an opinion of this office dated May 25, 1954, to Honorable Charles E. Murrell, Jr., Prosecuting Attorney of Knox County, Missouri, wherein it was held that the last board of trustees of a special road district organized under Sections 233.010-233.165, supra, should proceed to wind up the

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affairs of the district after a favorable vote to dissolve, and after all outstanding obligations are paid, they should turn over all property and machinery that had not been sold to the county court and pay into the county treasury any cash balance on hands.

It is to be noted that this opinion holds that if the district has voted the special tax authorized by Section 137.565, supra, for the year of dissolution, that the tax should be levied and collected. We would like to point out that this holding is based upon the proposition that the revenue derived from said tax will be required to take care of the outstanding obligations of the district, since there is no statute making the county liable for the obligations of a special road district that has voted to dissolve and permitting the expenditure of county road and bridge tax funds to discharge the obligations of such district. You have advised in the telephone conversation that the LaMonte Special Road District had enough cash on hands at the time of the vote to dissolve to discharge all outstanding obligations of the district and that none of the special tax previously authorized by a vote of the district will be needed in winding up the affairs of the district.

You inquire whether the special tax voted at the special election held on March 24, 1959, is to be levied and collected during the year of 1959 in view of the subsequent vote to dissolve LaMonte Special Road District.

Section 137.565, supra, provides that any general or special road district may vote an additional tax in excess of the statutory authorization, said tax not to exceed 35 cents per \$100 evaluation. Section 137.575, RSM 1949, provides as follows:

"If a majority of the qualified voters voting at such election shall have voted for such additional tax, it shall be the duty of the county court to make the levy for such district, which levy shall not exceed the amount named in the order calling such election. Such levy shall be in addition to other taxes which the county court is authorized to levy as provided by law. The tax so authorized by such district shall be collected in the same manner and at the same time as state and

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county taxes are collected and placed to the credit of the road district authorizing such special levy. (R.S. 1939, §8531, A.L. 1945 p. 1478)." (Emphasis ours).

Section 137.575, set out directly hereinabove, requires the county court to levy the special tax when authorized by a vote of the voters in any road district. Therefore, it if were not for the subsequent vote to dissolve, the county court would have no alternative but to levy the special 35 cent tax as authorized by the voters in the LaMonte Special Road District. The question before us is whether the subsequent vote to dissolve has any effect on the duty of the county court to levy the special tax previously authorized by the voters of the district. We believe that it does.

A favorable vote on a proposition to impose an additional tax does not constitute a levy of the additional tax; it simply authorizes the taxing board, in this instance the county court, to levy the tax by an appropriate resolution or other formal action. 40 C.J.S. 359. See also People ex rel. Ricker v. Chic. M. & St.P.Ry. Co., 142 NE 167.

Section 137.575, supra, provides that the special tax shall be collected in the same manner and at the same time as the state and county taxes are collected and placed to the credit of the road district authorizing such special levy.

In the instant situation the road district for whose benefit the tax would be levied and collected is no longer in existence, except for the fact that its affairs have not been completely wound up. Therefore, as the revenue from the special tax will not be needed to discharge existing obligations of the road district, if the county court levied the tax, the revenue derived therefrom could not be placed to the credit of the road district since it has been dissolved. As the district was solvent at the time the district voted to dissolve and as none of the revenue from the special taxes needed to discharge obligations from the district, it is our opinion that the special tax authorized by a vote of the district on March 24, 1959, should not be levied by the county court. It is our view that the vote to dissolve nullified all previous acts of the district contrary thereto, especially the authorization to levy the special tax.

You inquire whether money deposited with the county court by commissioners of a special road district that has voted to dissolve shall be entered as general revenue for class 3 funds

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or shall the money be held separately and expended on roads within the boundaries of the dissolved district,

Section 233.160, RSMo 1949, provides for the manner in which special road districts organized under Sections 233.010-233.165, supra, may dissolve. Section 233.165, supra, provides for the levy of a tax to pay the bonded indebtedness of dissolved road district. Otherwise the statutes are completely silent as to the procedure to be followed upon a vote to dissolve a special road district organized under the above-cited sections and as to the disposition of the property and assets of such a district after all obligations have been discharged.

The legislature has provided the procedure to be followed upon dissolution of a special benefit assessment road district (Sections 233.290-233.315, RSMo 1949), but has not seen fit to enact similar legislation for a district such as here involved. Section 233.290, supra, provides that upon dissolution of such a benefit assessment district, the county court shall divide the land in the dissolved district into road districts under the provisions of Sections 231.010 to 231.030, 231.050 to 231.100, and 137.555 to 137.575, RSMo 1949. This section further provides that any money that may be on hand to the credit of such special benefit assessment road district after all liabilities have been taken care of shall be turned over to such new road districts in proportion to the number of acres allotted to each new district. However, the statutes relating to the type of road district involved herein are completely silent as to the disposition of the money and assets remaining after the affairs of the district have been wound up and it must be presumed that the legislature intended a different procedure in such districts than is provided for special benefit assessment districts.

Presumably, the money to be deposited to the county court by the commissioners of the LaMonte Special Road District has been derived from: (a) Proceeds from the sale of certain city and county licenses as provided by Sections 233.120 and 233.125, supra, (b) Special road and bridge taxes provided under Sections 137.555 and 137.575, supra. (c) Proceeds of road bonds issued under the authority of Section 233.450, RSMo 1949.

It is obvious that the intent of the statutes cited herein directly above, under which the funds of the LaMonte Special Road District have been derived, is that funds derived under said statutes should be used for the purposes for which they are collected.

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Section 137.555, supra, provides that:

"* * *all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever;* * *"

Section 233.465, RSMo 1949, pertains to road bonds and reads as follows:

"The board of commissioners on behalf of the special road districts, and the county court on behalf of the townships, shall sell said bonds to the best advantage and the proceeds shall be paid over to the treasurer of the district or the county or township, as the case may be, and be by him disbursed, on the order of the board of commissioners or county court, in payment of the cost of holding said election and in paying the cost of constructing or improving roads in such districts or townships, including bridges and culverts."

Sections 137.575, 233.120 and 233.125, supra, under the authority of which some of the funds of the LaMonte Special Road District were derived, indicate that money raised pursuant to the provisions therein shall be used only for road and bridge purposes. Therefore, it is evident that, although there is no expressed statute directing that the cash balance of a dissolved special road district be entered as class 3 funds, the general intent of all the statutes relating to roads and bridges is that money raised for road and bridge purposes should be used for those purposes only.

It may be argued that as the 35 cents levy voted by the residents of the district for the year of 1958, and previous years thereto, under the provisions of Section 135.565, supra, was collected only from the residents of LaMonte Special Road District and should be held separate from the general class 3 funds for expenditure within the boundaries of the district as it existed prior to its dissolution. If this is true, then the amount to be held separate and apart from the general class

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3 funds would have to be determined by the proportion that the income of the district derived from the special levy bears to the total revenue of the district.

While the foregoing argument may be logical, we can find no authorization in any statute for the county to create and maintain a separate fund within the class 3 fund for expenditure within the boundaries of dissolved special road districts organized under Sections 233.010-233.165, supra. Section 50.680, RSMo 1949, which classifies the proposed expenditures of a county, makes no provision for a special fund within the class 3 fund, and there is no provision whatsoever in the statutes relating to the dissolution of the special road districts that such funds be kept apart and separate and be expended within the boundaries of the dissolved district.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) The special tax authorized by a vote of the voters of the LaMonte Special Road District on March 24, 1959, should not be levied by the county court.

(2) The cash balance, remaining after the affairs of the LaMonte Special Road District have been wound up and all obligations have been discharged, should be deposited in the class 3 fund and not maintained as a separate fund to be expended only on roads contained within the boundaries of the dissolved district.

The foregoing opinion, which I hereby approve, was prepared by Calvin K. Hamilton, one of my assistants.

Very truly yours,

John M. Dalton
Attorney General

CKH/mjd
Enclosure

TEACHERS: County superintendents may issue third grade certificates only on the basis of examination of applicants whose examinations are graded by the county superintendents. Issuance of certificates to teach on the basis of grades is confined to the State Board of Education.

TEACHERS' CERTIFICATES:

April 15, 1959



Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

This is in reply to your letter of March 17, 1959, that we submit an opinion to your question concerning third grade teaching certificates, which question reads as follows:

"Can a County Superintendent of Schools, in the issuance of a third grade county certificate, use grades which the applicant has made in one of the state educational institutions and in such other schools as may be approved by the state board of education, as referred to in Section 168.100, in lieu of actual grades made by the applicant in a regular or special examination conducted by the County Superintendent for a third grade county certificate?"

To enable a teacher to teach in public-supported schools, Section 168.010, RSMo, requires that a teacher must receive a valid certification of qualification entitling him to teach. The failure to procure such a certificate before assuming a position as a teacher is a misdemeanor, which is applicable either to a teacher failing to receive such a certificate or to directors who employ teachers who do not have the requisite certificate. See, in this regard, Section 168.020, RSMo.

Section 168.030, RSMo, vests issuance of teaching certificates in the State Board of Education. This section reads as follows:

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"The state board of education shall have sole authority to grant certificates of license to teach in the public schools of the state, except that graduates of Missouri state colleges, state teachers' colleges, the University of Missouri, and Lincoln University, upon receiving the degree of bachelor of science in education shall be awarded, by the college or university, a life teaching certificate which shall bear the signature of the commissioner of education and shall be registered in the state department of education, also except that county superintendents of schools will have the authority to grant third grade county certificates."

There are two exceptions to issuance of certificates by the State Board of Education: One, that graduates of state schools in the training of teachers upon graduation and registration of their degrees with the State Board of Education confirming such graduation, a life teaching certificate is awarded, and, secondly, it exempts a right to county superintendents to issue third grade certificates.

The next applicable enactment providing for issuance of teachers' certificates is Section 168.040, RSMo, which reads as follows:

"1. For the purpose of granting teachers' certificates upon the basis of examination, two public examinations of two days each shall be held during each year on the second Fridays and the succeeding Saturdays in March and July at such place or places in the county as the county superintendent of public schools may designate. Said examinations shall be conducted by said county superintendent of public schools or by someone duly authorized by him to conduct them. All questions given in said examinations shall be prepared and furnished by the state department of education which shall also determine the rules and regulations under which the examinations are given, except those questions given for a special third

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grade certificate which can be prepared by either the state department of education or the county superintendent of schools.

"2. Within three days after the close of each regular examination, the county superintendent of public schools shall forward all papers of applicants to the state department of education by express or registered mail, except the papers given to those applicants applying for third grade certificates, and requesting that they be graded by the county superintendent. Said state department of education shall grade carefully all such papers received, keep a record of said grades and preserve all examination papers for at least one year.

"3. Certificates issued by the state department of education shall be of three grades; third grade certificates shall be valid for one year, second grade for two years and first grade for three years. Certificates shall be granted to applicants who are of good moral character and shall pass satisfactory examinations upon the subjects prescribed by the state board of education. Special examinations may be authorized by the commissioner of education upon request of the county superintendent of schools." (Emphasis ours.)

By the terms of Section 168.040, supra, third grade teaching certificates are to be valid one year. Likewise, by that section issuance of third grade certificates is provided for on the basis of examination, but vests in the county superintendent the power to either use his own questions in such examination or to use those prepared by the State Department, and to either grade these papers himself or let the State Department of Education grade them.

Note also that the portion which we have underscored in paragraph 2 of Section 168.040, supra, indicates that the county superintendent grades only a limited class of examination papers, those of third grade certificate applicants who

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have requested that he grade their papers. The remaining examination papers are forwarded to and graded by the State Board of Education.

Provision for issuance of certificates on the basis of approved grades is Section 168.100, RSMo, which reads as follows:

"Grades made in the state educational institutions, and in such other schools as may be approved by the state board of education, and obtained under conditions conforming to the requirements prescribed by the state board of education, may be accepted in lieu of examinations on certain subjects required for certificates issued upon the basis of examinations, provided that such grades are properly certified by the educational institution to the state department of education. Grades made under the provisions of sections 168.030 to 168.110 shall become void if the holder thereof shall have ceased to be engaged in active educational work as a teacher, a student in school, a supervisor or administrator in school work for a period of two consecutive years."

As an alternative to issuing certificates on the basis of examination, Section 168.100, supra, provides that examination for certificates may be waived where the applicant has received satisfactory grades in the subjects of the examination as certified by approved schools to the Department of Education. This provision lists only one limitation on the acceptance of appropriately certified grades in lieu of examination, and that is that the applicant for certification must not have ceased to have been in school or pursuing his vocation in the educational field for a period of two years prior to the issuance of the certificate. This section contains no limitation that the applicant must have passed an examination, but provides a substitute for examination.

However, since the language of this section is directed to requirements prescribed by the State Board of Education and is then permissive in its nature, while remaining silent as to county superintendents, it therefore does not appear

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that this section applies to county superintendents. This premise is further strengthened by the fact that Section 168.040, RSMo, the second of the two statutes excepting the right to issue third grade certificates to county superintendents, provides for issuance of certificates on the basis of examination, thus indicating a legislative intent to confine the county superintendent's control of third grade certificates to issuance on the basis of examination, and then in the one limited instance where the applicant requests that he grade the examination.

The only other requirement as to issuance of third grade certificates by county superintendents is the requirement imposed by Section 168.050, RSMo, that the applicant must be of good moral character and a high school graduate.

CONCLUSION

Therefore, it is the opinion of this office that the right to issue third grade certificates by county superintendents is limited to examinations which the county superintendent has graded. Only the State Department of Education is authorized to accept grades in lieu of examination.

Yours very truly,

JOHN M. DALTON
Attorney General

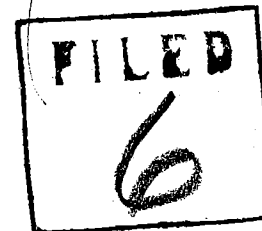
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GUARDIANS OF INSANE:

BONDS:

A bond given by the legally appointed guardian of an incompetent does not make unnecessary the giving of the bond for maintenance at a state hospital as a private patient required by Section 202.863, RSMo Cum. Supp. 1957.

June 11, 1959



Louis Bellinson, M.D.
Deputy Director
Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The following is an excerpt from a letter directed to you thru this office from Dr. A. K. Baur, Superintendent of the Fulton State Hospital:

'In your letter of January 22, 1959, you gave us a decision that a Public Administrator who in the course of his official duty becomes the custodian of an insane person and curator of such person's estate and whose ward is admitted to a state hospital as a private patient is not required to give the maintenance bond which is provided for in Section 202.863, RSMo, Cum. Supp. 1957, because the official bond given him as a Public Administrator covers such a situation.

"We are now in receipt of a letter from Judge Sam Hess, Phelps County Probate Court, which reads in part as follows:

'Since it is very difficult for us to obtain another guardian if Mr. Allison's letters are revoked for cause,

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and since Mr. Allison is already accountable to the court for what he does, and since he appears to have a phobia with respect to giving a bond, it is suggested that Mr. Allison pay the \$40.00 per month as ordered and without giving any customary bond. However, should he fail to make payment required we may be compelled to revoke his letters and search for a different guardian.'

"Although we understand that a Public Administrator is bonded to the State while other legal guardians are bonded to the Probate Court, we are wondering if the interpretation of the law with regard to Public Administrators might be extended to cover legally appointed guardians, other than Public Administrators.'

"Inasmuch as it is my feeling that formal requests for opinions from your office should come only from the central office of the Division, I have taken the liberty to incorporate the details of Dr. Baur's inquiry into this request.

"As soon as we receive your interpretation and opinion, we will see to it that the Fulton State Hospital is properly informed.

"I am assuming, of course, that you agree with me in this manner of presenting questions of legal interpretation to your office."

We first direct attention to Section 475.100, V.A.M.S. 1949, which aforesaid section was Section 302, p. 385, Laws 1945, and which section reads:

"1. Every guardian of a minor or incompetent, before entering upon the duties of his office, shall execute and file a bond, approved by the court, procured at the expense of the estate with sufficient surety in an amount fixed by the court at not less than double the value of the personal estate and one year's income from the estate except that where a corporate

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surety bond is provided the court may fix the bond in an amount not less than the actual value of the personal property of the estate and one year's income from the estate. Sections 473.157 to 473.217, R.S. Mo, relating to the bonds of executors and administrators, except subsection 1 of section 473.157, RSMo and subsection 1 of section 473.160, RSMo, are applicable to the bonds of guardians.

"2. The probate court may, at any time, require any guardian to give a new bond or additional security, as the circumstances of the case require; and if any order for that purpose is not complied with within the time therein stated the appointment of the guardian may be revoked, and another appointed who will give the bond and security required."

Following the aforesaid section is the "form" of the bond of a guardian. We quote the following portion of this aforesaid bond:

"IN THE PROBATE COURT OF _____ COUNTY,
MISSOURI, AT _____
Estate Number _____

BOND OF GUARDIAN WITH PERSONAL SURETY

In the estate of _____
Incompetent Minor

I, _____, as principal, and
_____ as surety, are held
and firmly bound to the state of Missouri
to and for the use and benefit of _____
incompetent minor, in the sum of _____
Dollars, for the payment of
which we bind ourselves, our heirs, executors,
administrators and assigns jointly and
severally.

The condition of the bond is, that if _____
who has been appointed _____
guardian of the _____
(person and estate)
of _____
(person) (estate)
incompetent minor, shall faithfully administer

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said estate, account for, pay and deliver all money and property of said incompetent minor and perform all other things touching such guardianship required by law, or the order or decree of any court having jurisdiction, then the above bond to be void, otherwise to remain in full force. * * * (Emphasis supplied.)

From the above section, it would appear that the bond of the guardian is intended to and does only cover the estate of the incompetent which comes into his hands in his capacity as guardian and to guarantee that such estate will not be lost through his misconduct. We fail to see that there is in such a bond any intimation that it could be construed to in anywise cover or be a substitute for the bond provided for in Section 202.863, RSMo Cum. Supp. 1957, which is the bond given to cover maintenance costs of a person admitted to a state hospital as a private patient.

In your letter to us you refer to our opinion rendered January 22, 1959, to Dr. Alfred K. Baur, Superintendent of State Hospital No. 1. In that opinion, we held that a public administrator who caused to be admitted to a state hospital as a private patient an incompetent who had been committed to his care in his capacity as public administrator need not comply with Section 202.863, supra. The basis for that holding is that the public administrator's bond covers all of the official duties that such public administrator has as a result of his public office, and that he is not personally liable for any payment except that which can be made out of his ward's estate and that he is, therefore, not required to provide the bond provided for in Section 202.863. It is, of course, obvious that the public administrator becomes guardian because of his occupancy of his office, but other guardians, such as the one now under consideration, are appointed by the probate court and can accept or reject such appointment. We feel, therefore, that there is a clear distinction between the situation with respect to a public administrator and a guardian such as is here under consideration.

CONCLUSION

It is the opinion of this department that a bond given by the legally appointed guardian of an incompetent does not make unnecessary the giving of the bond for maintenance at a state

Louis Bellinson, M.D.

hospital as a private patient required by Section 202.863,
RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:hw;ml

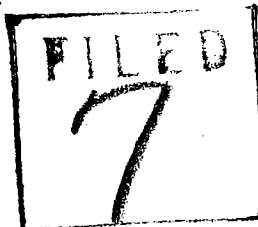
PUBLIC RECORDS:
MANUSCRIPTS, MAPPING
PROJECT:
STATE GEOLOGIST SHALL
ALLOW GENERAL PUBLIC TO
INSPECT:

Manuscripts of aero-magnetic mapping project to be placed in open file of division, as provided by Section 256.090, RSMo 1949. Manuscripts are public records, and subject to reasonable rules and regulations; state geologist shall release them for inspection of general public. He cannot release them first on

a preferential basis to mining companies which contributed funds toward expense of project.

May 1, 1959

Honorable Thomas R. Beveridge
State Geologist
Missouri Geological Survey and
Water Resources
P.O.Box 250
Rolla, Missouri



Dear Mr. Beveridge:

This department is in receipt of your request for a legal opinion, reading as follows:

"I am writing for an opinion from your office regarding the legality of a program I am proposing for the Division of Geological Survey and Water Resources in conjunction with private mining companies.

"We propose to use State-appropriated funds to do aero-magnetic mapping, under contract to the lowest qualified bidder, of an appreciable area in southeastern Missouri. We also are considering the possibility of major mining companies, contributing matching funds to this project so that a larger area may be covered with funds available. Under such an agreement, those companies which match funds with State funds would have first access to the data obtained while it is still in manuscript form and the non-contributing general public would not have access until the data are published--a period of approximately a year after the release of manuscript data to the contributors.

"In the opinion of your office, is such an agreement of preferential release of data legal? We had an identical agreement in the late 1940's for the original aeromagnetic mapping which resulted in the Pea Ridge iron discovery, but in checking the files, I cannot find any record of my predecessor, Dr. Clark, obtaining an opinion from your office.

Honorable Thomas R. Beveridge

"To me, the action is completely ethical and honest, and worked amicably in the past, but I want to make certain that there is no danger of being on thin ice legally. Should any further details or facts be needed, I will be delighted to supply them promptly."

All sections referred to herein are to RSMo 1949, unless otherwise stated.

Section 256.050 sets out the general duties of the state geologist, and reads as follows:

"It shall be the duty of the state geologist and his assistants, under the instructions and directions of the governor, to carry on, with as much expedition and dispatch as may be consistent with minuteness and accuracy, a thorough geological survey of the state, with a view to determine the order, succession, arrangement, relative position, dip or inclination and comparative magnitude of the several strata or geological formations within this state; to discover and examine all beds or deposits of mineral contents and fossils; to determine the various positions, formations, arrangement, composition, and utilization of the many different ores, clays, rocks, coals, mineral oils, natural gas, surface and ground waters, and other mineral substances as may be useful or valuable; to assemble and cause to be published an annual statistical report of the mineral production in the state; to have prepared topographic relief maps of areas and districts of the state toward the end of preparing a complete and accurate topographic relief map of the state; to apply geologic engineering principles to problems of agriculture, conservation, construction and other scientific matters that may be of practical importance and interest to the welfare of the state; to cause to be reported on maps, charts, or by other appropriate means, the results of geologic investigations as said investigations are completed; to publish or cause to be published any reports of work completed, in the form of maps, charts, pamphlets, bulletins, volumes, or circulars for general distribution; and to have prepared, and published, educational bulletins on subjects pertinent to geological studies, for distribution to educational institutions and persons interested in geology, paleontology, mineralogy, physiography, and mining."

Honorable Thomas R. Beveridge

Section 256.100, provides that with the approval of the governor the state geologist shall be authorized to negotiate for such technical work beyond the facilities of the division, and reads as follows:

"The state geologist, with the approval of the governor shall be authorized to negotiate for such technical work as may be necessary beyond the facilities of the division. He shall also purchase equipment, apparatus and supplies within the funds appropriated therefor."

From the provisions of the foregoing statutes it is obvious the state geologist is authorized to conduct the map-making project referred to in the opinion request, providing said statutory provisions are followed. The particulars, and the methods contemplated in negotiating with a private concern for services in doing the aero-magnetic mapping does not appear from the opinion request, nor have we been furnished with a copy of any tentative form of contract which may be entered into by such concern and your division. However, for the purposes of our present discussion it will be assumed that whatever the particulars, the method of negotiation, or the form of the contract to be finally entered into, that this matter will have been legally and properly consummated.

We have not been informed whether or not the manuscripts from the map-making project will be placed in the open file of your division, and if it is from this file the major mining companies referred to, will be allowed access to such documents before they will have been made available to the general public.

Section 256.090 provides when information shall be released to the public, and reads as follows:

"1. To expedite the release of general information or new discoveries the state geologist may furnish such items to the press and radio. The unpublished reports and data gathered by the state geologist and his assistants shall be maintained in an open file at the headquarters of the division. Confidential data supplied to the state geologist from outside sources shall cease to be confidential and shall be placed in the open file at a reasonable time after the completion of the project.

"2. The state geologist is hereby authorized to furnish to educational institutions, located within the state of Missouri, collections of minerals, rocks or fossils, but the division shall retain title to such collections. Educational institutions shall pay the expense of transporting said collections."

Honorable Thomas R. Beveridge

It is noted that Section 256.090 supra, requires the unpublished reports and data gathered by you and your assistants to be placed in the open file at the headquarters of your division, and that confidential information received from outside sources by you shall be placed in said file a reasonable time after completion of the project, and shall cease to be confidential.

While Section 256.090 does not expressly so provide, yet, in view of the non-confidential nature of the documents in the open file, the implication is that such documents take on the characteristics of public records, and this raises the question as to whether or not they are actually public records. The answer to this question is very material to the inquiry and must first be determined before such inquiry can be answered.

In this connection, we direct your attention to the case of State v. Henderson, 169 SW2d 389, in which the court discussed what documents filed in a public office are public records, and at l.c. 392, said:

"[2] In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; Robinson v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.2d 23."

Again, in the case of Disabled Police Veterans Club v. Long, 279 SW2d 220, the court defined the term "public records" and discussed the right of the public to inspect public records, subject to certain exceptions. At l.c. 223, the court said:

"[6] Independently of the statute the term public records covers not only papers expressly required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office. International Union, etc. v. Gooding, 251 Wis. 362, 29 N.W.2d 730, 735; Conover v. Board of Education, etc. 1 Utah 2d 375, 267 P.2d 768, 770; People v. Shaw, 17 Cal. 2d 778, 112 P.2d 241, 259.

"[7] Generally, any writing or document constituting a public record is subject to inspection by the public. State ex rel. Kavanaugh v.

Honorable Thomas R. Beveridge

Henderson, supra. Nor is it essential that the inspection of public records be limited to persons who have some legal interest to be subserved by the inspection. Neither does it detract from the right to inspect public records that it is done for others for compensation. State ex rel. Eggers v. Brown, etc., 345 Mo. 430, 134 S.W.2d 28. And the right to inspect carries with it the right to make copies. State ex rel. Conran v. Williams, 96 Mo. 13, 19, 8 S.W. 771.

"[8] This right to inspect and to copy public records is not an unlimited right. It is subject to such reasonable regulations as may be imposed to prevent undue interference with the proper functioning of the public officials involved. State ex rel. Eggers v. Brown, supra.

"[9] Furthermore, public policy demands that some public records must be kept secret and free from common inspection. In certain situations public records may, in the public interest, be withheld from public inspection. It is unnecessary to consider further this common-law exception to the right to inspect public records because the respondents have made no serious claim to come under any common-law limitation and we are unable to discover any. They are in no position to insist that any public interest will be served by keeping the requested information secret. International Union, etc. v. Gooding, 251 Wis. 362, 29 N.W.2d 730, 736."

From the definitions and descriptions given of that class of documents said to be public records in the above-cited cases, it is apparent that the manuscripts from the aero-magnetic mapping project, would be public records. The manuscripts belong to the same general class of unpublished reports and data referred to in Section 256.090, supra, and should be placed in the open file of your office.

Ordinarily, the public is entitled to inspect all public records of a public official unless their contents are of such a nature that they cannot properly be made available to the general public, as the court pointed out in the Disabled Police Veterans Club Case.

In the present instance, it is not suggested or even intimated that the contents of the manuscripts in question are of such a nature they cannot be released to the general public after the

Honorable Thomas R. Beveridge

completion of the project, but rather the contrary appears to be true. It is noted the custom is that information of this nature has previously been released by your predecessor to mining company contributors on map-making projects under the same or similar circumstances referred to. No doubt the information would not have been released if it had been believed improper, but would have been kept from the mining companies and the public.

The only reason offered for allowing the manuscripts to be first inspected by certain mining companies, before the records are made available to the general public, is that such mining companies have contributed funds to the project and should be allowed this privilege in preference to non-contributors.

With this type of reasoning we cannot agree, as we do not believe the fact that some have contributed and others have not contributed to the project should be considered in determining who shall and who shall not be allowed to inspect the records. If the manuscripts are of a nature that the public can inspect them without prejudice to the rights of the State of Missouri, then such records should be made available to the general public for inspection as soon as possible after the project has been completed.

It is believed that as custodian of these public records you have the right, and should make whatever reasonable rules and regulations you find to be necessary for the due protection and preservation of same.

It is further believed that the release of such public records on a preferential basis, only to the mining companies, which have or will have contributed funds to the map-making project in the manner you have described, before the manuscripts will have been made available to the general public, is unreasonable, against public policy, and that you are legally unauthorized to follow such a practice.

CONCLUSION

Therefore, it is the opinion of this department that manuscripts from an aero-magnetic map-making project of the state geologist, should be placed in the open file of the Division with other unpublished reports and data, in accordance with the provisions of Section 256.090, RSMo 1949. Said manuscripts are public

Honorable Thomas R. Beveridge

records, and subject to reasonable rules and regulations promulgated for their protection, the public has a right to inspect them. The state geologist is unauthorized to release such manuscripts first to mining companies which have contributed funds toward the expense of the project, but it is his duty to release the manuscripts on a non-preferential basis and to make them available for inspection of the general public.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

CIRCUIT CLERK AND RECORDER
FOURTH CLASS COUNTY
COMPENSATION:

The circuit clerk and recorder of a fourth class county with a population of between 7,500 and 10,000 and with an assessed valuation of between five and six million dollars is entitled to receive an annual salary of \$2,850.00. Section 483.367, V.A.M.S., which section was repealed by the laws of 1953, has not been re-enacted.

February 5, 1959

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"Will you give us the proper calculation of the salary of the Circuit Clerk and Recorder of a fourth class county, population between 7,500 and 10,000, with assessed valuation between five and six million dollars.

"Has section 483.367 repealed by laws of 1953, page 403 been reenacted, or a new section in lieu of this section been enacted?"

In numbered paragraph (2) of Section 483.370, RSMo 1949, I note that the compensation of a circuit clerk and recorder in counties of the fourth class having a population of 7,500 and less than 10,000 the salary shall be \$1,500.

In Section 483.375, subparagraph (b), I note that the circuit clerk and recorder in counties of your size is to receive the sum of \$200.00 as compensation for services as clerk of the juvenile division.

I also note in numbered paragraph (2) of the above section that for his services as member of the board of jury commissioners and as ex officio clerk of the board of jury commissioners the circuit clerk and recorder is to receive the sum of \$150.00.

In Section 483.371, Missouri Revised Statutes Cumulative Supplement 1957, I note that the circuit clerk and recorder is to receive the sum of \$300.00 annually for keeping a list of veterans and furnishing discharge copies.

Honorable Paul Boone

I note that Section 483.377 provides compensation for furnishing information to the county assessor and that in counties where the assessed valuation is more than five million dollars that the amount of this compensation is \$700.00.

I also note that the assessed valuation of Ozark County is in excess of five million dollars. This would make a total of \$2,850.00 which we believe to be the amount of compensation to which the circuit clerk and recorder in counties of your class of your size and valuation is entitled.

I note that your second question which is whether Section 483.367 which was repealed by the Laws of 1953 has been re-enacted or a new section enacted in lieu thereof. We do not find that such is the case.

CONCLUSION

It is the opinion of this department that the circuit clerk and recorder of a fourth class county with a population of between 7,500 and 10,000 and with an assessed valuation of between five and six million dollars is entitled to receive an annual salary of \$2,850.00.

It is the further opinion of this department that Section 483.367, V.A.M.S., which section was repealed by the Laws of 1953, has not been re-enacted.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

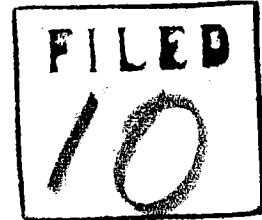
Very truly yours,

John M. Dalton
Attorney General

HPW:hw

TEACHER EMPLOYMENT: In a situation in which prior to April 15 of any school year a teacher notifies his employing school board that he will not contract with the board for the coming year, the board is under no obligation to acknowledge or to act upon receipt of this communication and the passing of the date of April 15 without the board notifying the teacher that he will not be re-employed does not constitute re-employment of the teacher by the board.

May 26, 1959



Honorable Earl Bollinger
Representative, Madison County
House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would appreciate an opinion on the following question:

"If a school teacher submits to the Board of Education a letter of resignation for the coming school year before April 15, and the Board of Education does not notify the teacher of his dismissal on or before April 15, can the teacher expect a contract under law 163.090?"

Section 163.090, RSMo 1949, to which you refer, reads:

"Except as may be otherwise provided by law, the provisions of section 163.080 relative to the time and manner of employing teachers shall apply only to their original employment; and their re-employment shall be subject to the regulations herein set forth. It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract

Honorable Earl Bollinger

of the current fiscal year; and not later than the first day of May of the same year the board shall present to each such teacher not so notified a regular contract the same as if the teacher had been regularly re-employed. Any teacher who shall have been informed of re-election by written notice or tender of a contract shall within fifteen days thereafter present to the employing board a written acceptance or rejection of the employment tendered; and failure of a teacher to present such acceptance within such time shall constitute a rejection of the board's offer. Any contract given a teacher may be terminated at any time by mutual consent of the teacher and the board. When the board of directors of any school district deems it advisable to close the school and send the pupils elsewhere rather than employ a teacher, said board of directors shall have power to terminate any contract continued under the provisions of this section by giving the teacher written notice of such termination not later than the first day of July next following the teacher's re-employment."

A reading of the above section would appear to indicate two things. One is that the section contemplates a situation in which neither the employed teacher nor the school board makes any communication with the other regarding employment of the teacher for the coming school year. The section holds that, when there is no such communication and April 15 passes, the board's permitting that date to pass without communication with the teacher, constitutes a proffer by the board of a contract to the teacher for the coming year on the same terms as the contract under which the teacher was employed. The section also imposes upon a teacher who shall have been informed of re-election by written notice or tender of a contract the duty to notify the school board, within fifteen days after such notice or tender, of his acceptance or rejection.

The second meaning which Section 163.090 carries, and we believe a very important one in the instant situation, is that the contract of employment is not a continuing one but that each contract is a new contract. In the case of *Bergmann v. Board of Education*, 230 S.W.2d 714, at l.c. 720, the Missouri Supreme Court, in referring to Section 163.090, stated:

"While the latter section provides for re-employment under specified circumstances, it expressly provides for the execution of

Honorable Earl Bollinger

a new, specific and distinct annual contract for each school year for which the teacher is employed.* * *

In the case of State v. School Dist. No. 7, 302 S.W.2d 497, at l.c. 499, the Springfield Court of Appeals stated:

"Section 163.090, on which relator relies, required the board to determine, on or before April 15, 1956, whether he would be re-employed for the succeeding school year beginning July 1, 1956 [Bergmann v. Board of Education of Normandy Consolidated School Dist., 360 Mo. 644, 654, 230 S.W.2d 714, 720], and the agreed statement of facts indisputably establishes that the board undertook to make such determination on April 6, 1956. The motion that 'we offer Gale Joslin a contract for the 1956-57 school year' appropriately recognized that Section 163.090 did not establish 'some sort of tenure for teachers' [Bergmann case, supra, 230 S.W.2d loc. cit. 720] and did not change the legal effect of the written contract under which relator was employed for the year ending June 30, 1956 [Dye v. School Dist. No. 32 of Pulaski County, 355 Mo. 231, 240, 195 S.W.2d 874, 879], but that, if relator was to be re-employed, the statute contemplated 'the execution of a new, specific and distinct annual contract,' for the succeeding year beginning July 1, 1956.* * *

We believe that this fact, to wit, that each yearly contract is a new contract, is significant here because we have a situation where the teacher, prior to April 15, has notified the school board that he will not make a contract with it to teach the following year. We do not believe that this notice by the teacher that he will not enter into a contract with the board, which contract would be a new contract, requires the board to acknowledge such notice by the teacher. As indicated by the two above cases cited, the teacher is not, by notifying the board that he will not contract for the coming year, "resigning," as he stated, but is simply notifying the board that he will not contract with it.

As further supporting this view and as introducing a new element which we believe to be very important, we note the case of Dye v. School Dist. No. 32, 195 S.W.2d 874. At l.c. 879, the Missouri Supreme Court en banc stated:

"Respondents' view is that the provision of Sec. 10342a extending a teacher's contract for another year in the circumstances stated therein operates retrospectively and changes the contract, itself, by imposing a new duty

and making its term two years instead of one. We do not think so. A retrospective law is one that relates back to, and gives to a previous transaction, some different legal effect from that which it had under the law when it occurred. A statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. Here, the original contract itself was not affected, and the appellant is not complaining. The new law merely imposed a statutory duty on both parties to give notice of its continuance or not. The public interest was involved. The respondents had almost five months in which to give notice after the statute became operative. It is necessary that such arrangements be made in advance. The State, with respect to its school boards, had the right to waive or impair its own vested rights, if any." (Emphasis ours.)

From the underlined portion of the above, it will be noted that the court holds that this law (Section 163.090) imposes a duty on both parties, that is the teacher and the board, to give notice to the other. It is true that the underlined portion of the above, with reference to the contract, uses the word "continuance," but we believe that the word is used in the light of the construction put upon the contract by the other portion of the quotation from the Dye case and in the light of the cases of State v. School Dist. No. 7 and Bergmann v. Board of Education, which holds that each year's contract is a new and separate contract.

We note also that the Bergmann case (l.c. 720) quotes the Dye case with approval and states:

"* * * It was there said 'the new law merely imposed a statutory duty on both parties to give notice of its (the contract's) continuance or not.'"

In view of the above and for the reasons given, we are of the opinion that when, prior to April 15, a teacher informs the employing board that he will not contract with the board for the coming year that there is no duty upon the board to acknowledge or to act upon the receipt of such communication and that the passage of the date of April 15 without notice by the board to the teacher that the teacher will not be employed does not constitute re-employment under Section 163.090.

Honorable Earl Bollinger

In reaching the above conclusion, we are not unaware of the case of Common School Dist. No. 27 v. Brinkman, 233 S.W.2d 768. The fact situation in that case had some similarity to that in the instant case but is, we believe, clearly distinguishable. In the Brinkman case, the teacher in question was not notified by the board prior to April 15 that he would not be employed for the coming year. Subsequent to the passing of April 15, he notified the board that he would accept re-employment and on the opening day of school appeared at the school to discharge his duties. The St. Louis Court of Appeals held that the board, by failure to notify prior to April 15, had re-employed the teacher on the basis of what is now Section 163.090, supra. However, the Brinkman case differed significantly from the instant case. In the Brinkman case, there was no showing whatever that prior to April 15 the defendant informed the board as a whole or any member singly that he would not contract with the board for employment for the coming year. At l.c. 770 of the opinion, it is stated that testimony was introduced to the effect that the defendant "had made statements that he would not accept the position as teacher of the school for the next succeeding year on the same terms provided for in his contract" for the past year. It is not indicated to whom he made such statements. At l.c. 771, the opinion states that defendant told the president of the board, prior to April 15, that he wanted an increase in salary. There was no indication that he stated that he would not teach unless he received the increase. At l.c. 772, George Koelling, a member of the board of directors, testified that prior to April 15 he had a conversation with the teacher in regard to teaching the coming year and that defendant stated that he would "like to have the school but he could not teach for the old price, that he would have to have the budget price which was \$200.00."

We do not believe that any of the above can be construed as being notice to the board by the teacher that he would not enter into a contract of employment with the board for the coming year. In the instant case, the teacher very clearly has done so. His use of the word "resign" in his letter to the board is not truly descriptive of his action as we have pointed out above. He could not "resign" from an employment which he did not have. His meaning, as we have indicated above, clearly was that he would not contract with the board with regard to teaching the school another year.

In view of the above, as we have said, we believe that the Brinkman case is clearly distinguishable from the instant case.

CONCLUSION

It is the opinion of this department that in a situation in which, prior to April 15 of any school year, a teacher notifies his

Honorable Earl Bollinger

employing school board that he will not contract with the board for the coming year, that the board is under no obligation to acknowledge or to act upon receipt of this communication and that the passing of the date of April 15 without the board's notifying the teacher that he will not be re-employed does not constitute re-employment of the teacher by the board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:hw:lvd

INSPECTION OF MORTUARIES: It is the opinion of this department that paragraph 1 of Section 333.035 of House Bill No. 498 enacted by the 70th General Assembly does not authorize a member of the State Embalming Board to enter and inspect a mortuary over the protest of the owner or proprietor thereof.

October 27, 1959

FILED

12

Honorable Clifford E. Brooks
President of the Board of Embalming
Albany, Missouri

Dear Mr. Brooks:

Your recent request for an official opinion reads:

"The 70th General Assembly of the of the State of Missouri has amended Chapter 333, Revised Statutes of Missouri of 1949 by inserting new Section 333.035 to give the State Board of Embalming power to suspend or revoke licenses.

"The Board hereby respectfully requests an official opinion from your office as to the meaning of the words "investigate the business activities" contained in Section 1 of the aforementioned section, and further whether the statutes authorizes and empowers the State Board of Embalming to inspect Preparation rooms of licensees, by virtue of the new section."

The above section reads in part:

"1. The state board of embalming may upon its own motion and shall upon written complaint filed with the board by any person under oath investigate the business activities of any licensed embalmer and may suspend or revoke any license obtained by false or fraudulent representation or for any of the following causes:

- (1) Conviction of a felony or a crime involving moral turpitude;
- (2) Willful violation of any professional trust or confidence;
- (3) Failure to properly embalm or to properly care for the disposition of any dead human body;

Honorable Clifford E. Brooks

(4) Failure or refusal to properly provide or guard against contagious, infectious or communicable diseases or the spread thereof, during the actual embalming, or while the body of diseased person is under his care or supervision pending interment or disposition;

(5) Accepting employment from any person or persons engaged in business of embalming if the place where the embalming is conducted is unsanitary, according to the standards of the public health laws of Missouri, or would in any manner permit the spreading of contagious, infectious or communicable diseases and if the place where the business of embalming is conducted does not contain a preparation room with a sanitary floor, walls and ceiling and adequate sanitary drainage and disposal facilities including running water;

(6) The practice of embalming without a preparation room in the place where embalming is performed or operating a place of embalming where the preparation room does not have a sanitary floor, walls and ceiling and adequate sanitary drainage and disposal facilities including running water;"

Prior to writing the above letter you have orally informed us that the question in which you are interested is whether or not the Embalming Board or any member thereof could present himself to any proprietor of a mortuary, request permission to inspect the preparation room in such mortuary and, if such permission were refused, enter the mortuary over the protest of the proprietor and proceed to make an inspection of the preparation room under the authority granted by the words "investigate the business activities" contained in paragraph 1 of Section 333.035 of House Bill No. 498, supra.

Our examination of the meaning of the term "investigate the business activity" has not been particularly productive so far as its bearing upon this issue is concerned. We may state here that we find no definition of the term by Missouri Courts.

In the case of *People vs. One 1951 Cheverlot Coupe*, 248 P2d 786, 1.c. 789, the California Court of Appeals held that an "investigation" is an inquiry into and examination of all reasonable available facts.

Honorable Clifford E. Brooks

We have examined numerous other definitions of the word "investigate" and note that all of them are of very much the same purport as that given above.

We have also noted numerous definitions of the word "business". In the case of Steinbeck vs. Gerosa, 151 NE2d 170, 1.c. 173, the New York Supreme Court states that "business" is a very comprehensive term including that which occupies the time, attention, and labor of men for the purpose of livelihood or profit. We have noted numerous other definitions of the word "business" and find that none of them are any more definitive than that above.

The meaning of the word "activity" is, we believe, sufficiently plain not to need definition.

Thus the words "investigate the business activity" are not very specific or definitive. It is a broad, comprehensive term which encompasses many things. It is furthermore a very loose term. We do not believe that it purports to authorize the entry of inspectors into an establishment without the consent of the proprietor thereof. In view of the fact that there is no statute, rule or regulation requiring the consent to such inspection by the licensee as a condition precedent to the issuance of a license, we do not believe that such right of inspection exists without the consent of the licensee.

CONCLUSION

It is the opinion of this department that paragraph 1 of Section 333.035 of House Bill No. 489 enacted by the 70th General Assembly does not authorize a member of the State Embalming Board to enter and inspect a mortuary over the protest of the owner or proprietor thereof.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh F. Williamson.

Very truly yours,

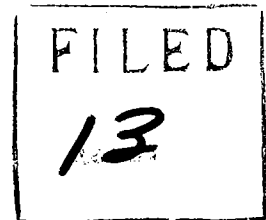
JOHN M. DALTON
Attorney General

KFW:ar

WARRANTS FOR ARREST: A warrant for the arrest of a person charged with a misdemeanor issued out of the magistrate court of a county and directed to all peace officers of the state may be served by any such officer anywhere in the state without any additional action being taken upon the warrant.

November 11, 1959

Honorable Don Burrell
Prosecuting Attorney
Greene County, Courthouse
Springfield, Missouri



Dear Mr. Burrell:

Your recent request for an official opinion reads:

"Recently one of the Sheriffs in a county North of the river refused to serve a warrant in a misdemeanor case because the warrant was certified by the Magistrate Clerk. He returned the warrant unserved indicating that if it was certified by the County Clerk that he would serve it. My question is: In warrants issued out of the Magistrate Courts of Greene County on misdemeanor cases, which warrants subsequently by necessity have to be served in another county, is it necessary that these warrants be certified by the County Clerk or can they be certified as we have done for many years in the past by the Magistrate Clerk? I would very much appreciate an opinion on this matter."

In regard to the above I direct your attention to Section 544.020, V.A.M.S. 1949, which reads:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Honorable Don Burrell

I also direct your attention to Section 544.090, which reads:

"Warrants issued by any judge of the supreme or circuit or criminal court of any county may be executed in any part of this state; and warrants issued by any other magistrate may be executed in any part of the county within which he is such officer, and not elsewhere, unless endorsed in the manner directed in Section 544.100."

And also to Section 544.100, which reads:

"If the person against whom any warrant granted by a magistrate, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to endorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant or any officer within the county within which the warrant is so endorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed, if the clerk of the county court of the county in which the warrant was issued shall endorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

It was no doubt upon the basis of these sections and particularly of the last that the sheriff in question acted or rather refused to act.

We now direct attention to Supreme Court Rule 21.09, which reads:

"Any warrant issued under these Rules shall be directed to all peace officers in the State of Missouri and may be executed in any county or municipality of the state by a peace officer thereof * * *."

As to the application of this rule, we direct attention to the committee report on Proposed Rules of Criminal Procedure for the Courts of Missouri and to page 9 of said report and to the commentary upon rule 9 which reads:

Honorable Don Burrell

"It is presently provided by 544.020 that warrants be directed to an officer. Section 544.090 says that warrants issued by Supreme, Circuit, or Criminal Court judges may be executed anywhere in the State. By Section 544.100 in fugitive cases warrants issued by the magistrate in the county from which the offender escaped may, when endorsed by a magistrate in the county where the offender is suspected to be, be served in such county. Rule 9 supplants these sections and provides that warrants may be directed to and executed by peace officers anywhere in the State without having possession of the warrant. The endorsement of the warrant is not required. This is a desirable improvement and is in accord with Federal Rule 4 and A.L.I. Code Sections 4 and 24 and Uniform Rule 4(c)1."

In view of the above we believe that the warrant in question, if it was directed to all peace officers in the State of Missouri, should have been served by the sheriff into whose hands it came without endorsement required by Section 544.100, RSMo.

CONCLUSION

It is the opinion of this department that a warrant for the arrest of a person charged with a misdemeanor issued out of the magistrate court of a county and directed to all peace officers of the state may be served by any such officer anywhere in the state without any additional action being taken upon the warrant.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

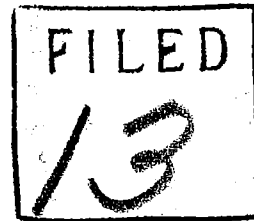
Very truly yours,

JOHN M. DALTON
Attorney General

BARBERS:
BARBER BOARD:
LICENSES:

We are of the opinion that the person mentioned in your opinion request is within the meaning of Section 328.010, RSMo 1949, and, therefore, required to obtain a license from the State Barber Board pursuant to Chapter 328.

December 30, 1959



Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Burrell:

We are in receipt of your recent letter in which you asked us for our official opinion on the following questions:

- "1. If a college furnishes a room and the equipment for shaving and cutting the hair of its students only, and permits one of its students to shave and cut the hair of fellow students only, for pay, is such hair cutting student a 'Barber' within the meaning of Section 328.010, R.S.Mo. 1949?
- "2. If, in addition to shaving and cutting the hair of fellow students, such student also shaves and cuts the hair of faculty members of the college as well as that of its students, for pay, is he a 'Barber' within the meaning of Section 328.010, Supra?"

Section 328.010, RSMo 1949, as amended, defines the term "barber" as it is used in Chapter 328 and reads as follows:

"Any person who is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public, shall be construed as practicing the occupation of barber, and the said barber or barbers shall be required to fulfill all requirements within the meaning of this chapter."

And Section 328.020, RSMo 1949, provides that:

"It shall be unlawful for any person to follow the occupation of a barber in this state, unless he shall have first obtained a certificate of registration, as provided in this chapter."

Honorable Don E. Burrell

Your question, rephrased, simply asks if the person referred to above is cutting the hair of the general public and thus within the meaning of Sections 328.010 and 328.020, supra.

The term "public" is used as a noun in Section 328.010, supra, and is defined in 73 C.J.S., pages 275-276, as follows:

"It has been said that the public exists in thought as an unexclusive group of persons, natural and artificial, and includes all who are subject to the state's jurisdiction. The word 'public' is inclusive of all the people and inhabitants, and is not exclusive or limited to a part or portion of the people, and in its enlarged sense takes in the entire community, the whole body politic. In its broadest meaning, the term 'public' distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic, yet it has been said that such a distinction is inadequate for practical purposes.

* * * * *

"The word 'public,' however, does not mean everybody all the time; it does not mean all of the people in the state, or in any county or town. It does not mean all the people, or most of the people, or very many of the people of a place, but so many of them as contradistinguishes them from a few. It designates individuals in general without restriction or selection."

In State ex rel. Anderson et al. v. Witthaus, 340 Mo. 1004, 102 S.W.(2d) 99, 102, the Court was considering in a prohibition action the question of whether or not plaintiff was a common carrier within the meaning of the bus and truck act. The Court discussed the term "public" and said:

"[2-5] * * * The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or

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unrestricted quality that gives it its public character. *White v. Smith*, 189 Pa. 222, 42 A. 125, 43 L.R.A. 498. 'It follows that the use must be so extensive as to imply an offer to serve all of the public, or that there be other circumstances from which it may be reasonably inferred that the carrier was undertaking to serve all to the limit of his capacity. One, however, does not become a public carrier because he is engaged exclusively in transporting persons or property or because the person or persons whom he serves take all his facilities. The test is whether he has invited the trade of the public.' *Klawansky v. Public Service Commission*, 123 Pa. Super. 375, 187 A. 248, 251. But, 'the public does not mean everybody all the time.' *Spontak v. Public Service Commission*, 73 Pa. Super. 219, loc. cit. 221 citing *Peck v. Tribune Co.*, 214 U.S. 185, 29 S. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075. * * *

Our Supreme Court thus recognizes the principle that the term "public" does not mean everybody all the time or all the people in the state or city but so many of them as contradistinguished from a few.

In this case, it is obvious that the students and faculty do not constitute "all the public" at Springfield; however, they do constitute a segment of the "general public." The fact that they are a restricted group, i.e., students and faculty of said college, does not, we think, make them any less a part of the general public.

We also direct your attention to the case of *Ex Parte Lucas*, Mo. Sup., 61 S.W. 218, 222, where our Court discussed the purpose and reason behind the enactment of Chapter 328, and ruled as follows:

" * * * : *** Is the occupation of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of the citizen, and protection from diseases spread from barber shops

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conducted by unclean and incompetent barbers, fully justify the law. It is a fact of which we must take notice that the people of today come in contact with, and engage the services of, those following the occupations of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined towards, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanliness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience, -- training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results likely to follow from such conditions is the foundation of statutes like this. And, as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it."

The barber law, then, is for the specific purpose of protecting the public from uncleanliness, incompetency, and spread of disease by the practice of barbering in this State.

To permit the person in question to cut the hair of a segment of the general public without a license simply because he does not offer his services to all would be ignoring the very purpose for which this law was enacted.

We do not believe that the legislature intended Section 328.010 to mean one is not a barber within the meaning of said statute unless he holds himself out to all the public. On the contrary, we are of the opinion that they intended to include and

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regulate such a person and activity as mentioned in your opinion request to us.

CONCLUSION

We are of the opinion that the person mentioned in your opinion request is within the meaning of Section 328.010, supra, and, therefore, required to obtain a license from the State Barber Board, pursuant to Chapter 328.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

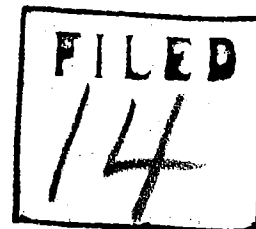
John M. Dalton
Attorney General

JBA:om

COUNTY COURT: The duty owed by a county hospital towards
NURSING HOMES: the county's indigent old is met with the
COUNTY HOSPITAL: completion of medical treatment. A county
court may provide for its indigent old by
paying a private nursing home institution
for their care if it determines this means
of care to be economically expedient. The
county may grant supplemental aid to its
indigent old in addition to that granted
by the state.

May 26, 1959

Honorable Charles M. Cable
Prosecuting Attorney Dunklin County
Bradley Building
Kennett, Missouri



Dear Mr. Cable:

This is in reply to your letter of April 2, 1959, requesting that we submit an opinion in response to an inquiry by Mr. Albert B. Osborne, Jr., Administrator of the Dunklin County Memorial Hospital, Kennett, Missouri, concerning certain patients of the county hospital which could be best served by nursing home care.

After reviewing Mr. Osborne's letter of March 30, 1959, we have formulated two questions which we feel state Mr. Osborne's inquiry. These questions are as follows:

1. Does the county hospital have the responsibility of providing nursing home facilities for aged wards of the county or aged indigents who are residents of the county, after it has cared for the patient's general hospital needs?

2. (a) In order to provide nursing home care for these aged indigents after the general hospital needs have been made, may the county pay a private nursing home the monetary difference between the patient's old age assistance check and the nursing home charges?

(b) If such charges may be paid, by whom are they payable, the hospital or the county court?

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In answering these questions, we are proceeding on the assumption that these people are indigent residents of the county who are unable to otherwise provide for themselves, or who are unable to secure care and support through relatives.

Section 1, of Article X, of the Missouri Constitution of 1945, provides as follows:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

The Legislature has seen fit to delegate powers to create and maintain hospitals to the counties and has also imposed a duty of taking care of the county poor upon the counties. In order to properly determine the duties and powers of the county hospital in relation to indigent patients who could best be served by the nursing home type care, we shall examine both the statutes pertaining to county hospitals and county care of the poor.

County hospitals are for the benefit of the county's inhabitants. Section 205.270, RSMo, embodies this premise together with provision for reasonable charges to patients who can afford them, but excepts paupers from the payment of these charges.

In governing the hospital the hospital board of trustees is empowered by Section 205.280, RSMo, to prescribe rules and regulations applying to the hospital's equipment, staff, as well as to its patients.

Certainly, no agency other than the hospital itself in the county would be competent to determine when a patient has completed medical treatment. Once this determination has been made, it terminates the hospital's duties towards the patient and the indigent aged person again becomes the responsibility of other county authorities to be discussed infra.

A county hospital is prohibited, by statute, from spending funds raised by the general hospital maintenance levy for activities other than maintenance or improvement of such hospital. The hospital maintenance levy statute is Section 205.200, RSMo, Cum. Supp. 1957, which expresses this prohibition as follows:

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"* * * The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

Under the terms of Section 205.190, RSMo, which prescribes the duties of the hospital board, they are given complete control of the expenditure of funds collected by the hospital to the credit of the hospital fund. It is our view, however, that the control of this fund is restricted to the needs and purposes of the hospital, not its indigent patients whose medical needs have been met by the hospital.

We pass next to the question of the county paying nursing home charges in private nursing home institutions or paying the monetary difference between a patient's old age assistance check and the institution's charges. The county's responsibility for the care of the poor is established by Section 205.580, RSMo, which reads as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Poor persons are defined by Section 205.290, RSMo, as follows:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law to maintain them, shall be deemed poor persons." (Emphasis ours)

By the terms of this section the ability to support themselves would seem to be the determinate factor as to whether the county need assist these persons. This determination is made by the county court according to Section 205.610 which provides as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the

Honorable Charles M. Gable

county, for the relief, maintenance and support of such persons."

It is the duty of the county court to set aside a sum sufficient to support its poor. Section 205.670 provides for this duty in the following language:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

While a county may, by the terms of Sections 205.640, 205.650 and 205.660, RSMo, erect and maintain a poorhouse, such institutions or county hospitals are not designed to provide the functions of a nursing home. Our Legislature, acting to enable counties to meet a recognized need to care for certain of its aged poor through this type of care, enacted, in 1957, Section 205.375, RSMo, Cum. Supp., providing that counties might maintain a nursing home.

Quite conceivably, a county may feel that it is uneconomical or inexpedient to maintain such an institution, yet it still has certain of its indigent old which it wishes to have cared for in this manner. Where the maintenance of such an institution would be uneconomical because of the small number of deserving indigent aged which the county wishes to provide for in this manner, we do not find that our statutes imposing a duty to care for the county's poor impose upon the county a duty to maintain such an institution, nor do our statutes specifically prohibit the county acting indirectly to provide such service, through the medium of an arrangement with a private nursing home institution, to maintain their support where this end may be more economically attained.

Based primarily on the county poor laws and the newly enacted nursing home law, we have thus far discussed the question of whether or not the county may provide for its indigent old who are in need of nursing home type care through payment to private institutions for that purpose. One factor of such payment is yet to be discussed, whether or not a county may determine who is "poor" under the laws cited, supra, after a determination of that person's needs by the state in

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granting old age assistance and after having made such a determination grant county aid in addition to the state grant. In doing so we shall briefly examine the history of Chapter 208, RSMo 1949, the portion of the statutes providing support by the state of its aged, in its relationship to the aforementioned county poor laws is found in Chapter 205, RSMo.

This state has made provision for its poor by statutory enactment since its inception as a state. In contrast, the old age assistance laws are of more recent vintage, being enacted first in their original form in the 1930s. By the later enactment these provisions, without any legislative declaration of preemption of the right to determine the needs of the aged applicant, by the state, we feel that it was not intended to be a determination exclusive in the state.

The rule is stated in *Sikes v. St. Louis & S.F.R.Co.*, 127 Mo. App. 326, 105 S.W. 700, 1.c. 702:

"* * * In examining this statute and seeking to arrive at the legislative intention therein manifested, we must do so with the knowledge that the Legislature is presumed to know the existing state of the law relating to subjects with which they deal at the time they act on a given question, and therefore are deemed to have dealt with the matter in the light of the state of the law then existing. * * *"

Eligibility for public assistance under the state old age assistance program is defined by Section 208.010, RSMo Cum.Supp. 1957, which reads in part as follows:

"In determining the eligibility of a claimant for public assistance under this law, it shall be the duty of the division of welfare to consider and take into account all facts and circumstances surrounding the claimant, including his living conditions, earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied. The amount of benefits, when added to all other

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income, resources, support and maintenance, shall provide such persons with reasonable subsistence compatible with decency and health in accordance with the standards developed by the division of welfare; provided, when a husband and wife are living together, the combined income and resources of both shall be considered in determining the eligibility of either or both. In determining the need of a claimant in federally aided programs, such amounts per month of earned income shall be disregarded in making such determination as shall be required for federal participation by the provisions of the Federal Social Security Act (42 U.S.C.A. 301 et seq.), or any amendments thereto. Irregular, casual and unpredictable income received by a claimant from performing odd jobs shall be excluded in calculating income. * * *

This section then goes on to list factors which will preclude applicants from receiving state aid, none of which would exclude the applicant by simply accepting additional aid from the county. A portion of this section quoted supra indicates that the board may consider all sources of income in granting state old age assistance, however, it does not in any way limit the county's authority to grant aid, nor do any other sections relating to state old age assistance.

CONCLUSION

Therefore, it is the conclusion of this office that:

1. The duty of a county hospital maintained by the county under Section 205.160, RSMo, and the sections immediately following, towards the aged poor of the county, has been terminated with the completion of medical treatment;

2. A county acting through the county court has a duty to determine the need of and care for its indigent old, which may be accomplished by paying a private institution to do so where the county court determines it is

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economically feasible;

3. Where the applicant is receiving state old age assistance checks it does not preclude the county from making separate determination of need and granting aid supplemental to that granted by the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant J.B. Buxton.

Very truly yours,

John M. Dalton
Attorney General

JMB:lc

COMPENSATIONS:
TREASURER'S:
THIRD CLASS TOWNSHIP
ORGANIZATION COUNTIES:

The twenty-five per cent of the fees and commissions referred to in Section 52.280, V.A.M.S. No. 2, May 1959, pertains to the maximum amount of fees and commissions which such officer is permitted to retain under provisions of Sections 52.260 and 52.270, V.A.M.S. No. 2, May 1959.

September 25, 1959



Honorable Charles M. Cable
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Cable:

Your recent request for an official opinion reads:

"The County Treasurer of Dunklin County, Missouri, has asked us to request an opinion from your office relative to what taxes under Sections 52.260 and 52.270 make up and establish the bracket for the purpose of determining the Treasurer's compensation. The taxes listed in Section 52.260 are:

State and County taxes.
Drainage District taxes.
Back taxes are levied each year
and a charge given to the
Collector, which figures
in making up the Budget.
Railroad and Utilities tax.
Merchants License and Tax.
Beer, Whiskey and Pool License.
School taxes paid by the State.
City Taxes.

"The Treasurer wishes to know whether the 25% of the maximum amount of fees and commissions mentioned in Section 52.280 pertains to current taxes only or does it pertain to the total commissions allowed by the Section."

Your request poses two questions, the first of which is what taxes under Sections 52.260 and 52.270, RSMo 1949 make up and establish the bracket for the purpose of determining the treasurer's compensation. We may note here that Section 52.270, supra, was

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amended by the Laws of 1955 and that it and 52.260 were last amended by Senate Bill No. 62 of the 70th General Assembly, V.A.M.S. No. 2, May 1959, but that such amendments do not affect the application of those sections to the question which you ask. We also note that Dunklin County is a township organization county of the third class.

On March 2, 1955, this department rendered an opinion to M. E. Morris, Director of Revenue for the State of Missouri, a copy of which opinion is enclosed, which we believe answers your first question. The citations referred to in that opinion have been re-enacted in different language and form, but we believe that the legal principles enunciated therein are still applicable.

You next direct our attention to Section 52.280, RSMo 1949, and ask whether "the maximum amount of fees and commissions mentioned in Section 52.280 pertains to current taxes or does it pertain to the total commissions allowed by the Section."

Section 52.280, as amended by Senate Bill No. 62 of the 70th General Assembly (see citations above), reads:

"In addition to the maximum amount of fees and commission permitted to be retained by county collectors in sections 52.260 and 52.270, each collector in counties of the third and fourth classes may retain for the payment of deputy and clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which the officer is permitted to retain by the sections, but the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue."

In view of the above section, it would appear that the twenty-five per cent referred to is to be based upon the greatest, or total amount, of fees and commissions which the treasurer is permitted to retain, under the provisions of Sections 52.260 and 52.270. This appears to be the perfectly clear language of the section.

CONCLUSION

It is the opinion of this department that the twenty-five per cent of the fees and commissions referred to in Section 52.280, V.A.M.S. No. 2, May 1959, pertains to the maximum amount of fees

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and commissions which such officer is permitted to retain under provisions of Sections 52.260 and 52.270, V.A.M.S. No. 2, May 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

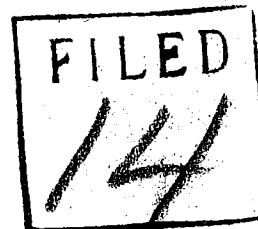
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/mlw
Enclosure

CLASSIFICATION OF CITIES: A municipality of village status, which has an official population of 4,063 can, if it changes its classification, only become a city of the third class.

October 9, 1959



Honorable E. J. Cantrell
Representative, 3rd District
St. Louis County
3406 Airway
Overland 14, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I am in quest of an official opinion concerning the change from a village form of government to a city form of government.

"In the event that a village with an official population of 4,063 at the last census wishes to adopt a city form of government, can it become a fourth class city, or does it have to elect to become a third class city because of its population?

"The Missouri Statutes do not indicate that a choice of going to a fourth class city is allowed if the village has a population entitling it to become a city of the third class."

We believe that you are correct in concluding that the Missouri statutes do not give a village with the population of the village in which you are concerned the choice of becoming either a third or a fourth class city.

We here note Section 72.070, Mo. R. S. Cum. Supp., 1957, which reads:

"Any city, town or village in this state, existing by virtue of the

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present general law, or by any local or special law, may elect to become a city of the class to which its population would entitle it under the provisions of sections 72.010 to 72.140, by passing an ordinance or proposition, and submitting the same to the legal voters of such city, town or village, at an election to be held for that purpose, not less than twenty days nor more than thirty days after the passage of such ordinance or proposition; and if a majority of such voters voting at such election shall ratify such ordinance or proposition, the mayor or chief officer of such city, town, or village shall issue his proclamation, declaring the result of such election, and thereafter such city, town, or village shall, by virtue of such vote, be incorporated under the provisions of the general law providing for the government of the class to which such city belongs, which class shall be determined by the last census taken, whether state or national. Whenever any village shall elect to become a city of the class to which it is entitled, the officers of such village, until new officers shall be elected and qualified, shall be the officers of such city, with the powers and functions corresponding to the powers and functions of the officers of the former village, the chairman of the board of trustees to act as mayor and the remaining trustees to act as aldermen, with the power to divide the city into wards and to call an election of officers of such city and to submit to the voters of such city in the manner provided by law such other matters or propositions as they may deem proper and as may be authorized by law."

In this connection we also note Section 72.040, RSMo 1949, which reads:

"All cities and towns in this state

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containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class shall be cities of the fourth class."

Inasmuch as the maximum population set forth above is 3,000 and inasmuch as your population is in excess of 4,000, it is clear that the above section is not applicable to your situation.

We also note Section 72.050, RSMo 1949, which reads:

"All towns not now incorporated in this state containing less than five hundred inhabitants, are hereby declared to be villages; provided, that any village in this state now or hereafter having more than two hundred inhabitants may by majority vote of the qualified electors therein elect to become a city of the fourth class."

It seems evident without extended comment that the above section is likewise inapplicable to your situation because of your population.

We also note Section 72.030, RSMo 1949, which reads:

"All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

Inasmuch as your municipality is contained within the population bracket set forth above it would appear that if you change your classification you have no alternative but to become a city of the third class.

CONCLUSION

It is the opinion of this department that a municipality of village status, which has an official population of 4,063

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can, if it changes its classification, only become a city of the third class.

The foregoing opinion which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:mwl:c

POSTAGE:
TAXATION:
INTANGIBLE TAX:

Five questions involving the procedure of the Director of Revenue in mailing intangible tax forms under Sections 146.050, 146.055 and 146.056.

September 28, 1959



Honorable Milton Carpenter
Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

You recently asked for an opinion as follows:

"For a number of years, it has been the policy of the Department of Revenue to prepay the postage on the intangible blanks for the use of St. Louis and for Jackson County, under the assumption that the City of St. Louis is not mentioned in Section 146.055, nor is the treasurer specifically designated in a first class county.

"We, therefore, wish to be advised as to the legal requirements of this particular section in reference to the following questions:

"1. Is the state of Missouri legally required to prepay the postage on the intangible blanks for the City of St. Louis?

"2. Is the treasurer of the City of St. Louis legally required to provide and mail these blanks in the event that the state is not required to pay the postage?

"3. Is the treasurer of Jackson County responsible for mailing the blanks in the event that the state in this case is not liable for prepayment of postage?

Honorable Milton Carpenter

"4. Is the state required to prepay the blanks on counties under the charter form of government, for example, St. Louis County?

"5. Is the state required to prepay the postage on intangible blanks for second, third and fourth class counties?"

You also informed us that your procedure in the past has been to mail each individual in Jackson County and in the City of St. Louis who paid an intangible tax for the past year a tax blank for the present year. It is about this postage that you inquire.

Section 146.050 of the Revised Statutes of Missouri, 1949, reads as follows:

"1. Except for the calendar year 1946, every person who, pursuant to any provision of this chapter, is liable for a property tax on intangible personal property, shall on or before March fifteenth of the year for which the property is subject to said tax, file with the department of revenue on a suitable form prepared and distributed by it, a property tax return on intangibles showing the kind of intangible owned, the amount of yield therefrom and the amount of tax for which he is liable for the year involved.

"2. The tax shall be payable at the time the return is made and shall become delinquent on June first of the year in which it is due."

Section 146.055, Revised Statutes of Missouri, 1957 Cumulative Supplement, reads as follows:

"It shall be the duty of the state director of revenue to furnish, on or before the first day of January in each year, to the county treasurers of each county under charter form of government and to the county treasurers of class two, three and four counties in this state, forms for the use of the citizens of this state to make property tax returns on intangibles as provided by section 146.050, in sufficient number to meet the needs of the respective counties. At the same time the director

Honorable Milton Carpenter

shall furnish to each treasurer a list of the intangible taxpayers of the respective counties who filed a state intangible tax return the preceding year."

Section 146.056, Revised Statutes of Missouri, 1957 Cumulative Supplement, reads as follows:

"1. On or before the fifteenth day of January of each year every county treasurer shall mail to each intangible taxpayer as listed by the director of revenue, and to such other persons as he may have reason to believe may be possessed of taxable intangible property a form prescribed and furnished by the director of revenue, together with a brief statement of what is required of the taxpayer under sections 146.055 and 146.056. Every county treasurer shall mail, on or before the first day of February of each year, to the director of revenue, a list of the additional names to whom he has mailed said form, which said list of additional names shall be added to the list held by the director of revenue as those who have intangible personal property subject to taxation.

"2. The county treasurer shall keep all such lists strictly confidential and shall not reveal the contents thereof to any person except as herein provided."

Section 54.275, Revised Statutes of Missouri, 1957 Cumulative Supplement, reads as follows:

"For the additional duties imposed upon county treasurers by section 146.056 RSMo 1949, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurers shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the director of revenue.

(1) In class four counties six hundred dollars per annum.

Honorable Milton Carpenter

(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.

(3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.

(4) In class three counties having a population of more than thirty thousand, one thousand dollars.

(5) In class two counties, one thousand dollars.

(6) In counties under charter form of government a compensation to be fixed by the county council."

Sections 146.055, 146.056 and 54.275, above quoted, were passed as one house bill. These three sections were contained in House Bill No. 199 passed in 1951. The heading of the bill was as follows:

"AN ACT relating to intangible personal property tax returns and to the duties of treasurers of counties under charter form of government and of the class two, three and four counties of the state and providing compensation for county treasurers for performing the additional duties required by this act."

Article III, Section 23, of the Constitution of Missouri, 1945, reads as follows:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

There may be a slight ambiguity in Section 146.056, supra, in that it refers to every county treasurer. We feel, however, in view of the title to the original house bill and in view of its provisions as to pay increase and further in view of the constitutional provision above cited, that the term "every treasurer",

Honorable Milton Carpenter

when used in this section, means in fact every treasurer in counties under the charter form of government and every treasurer in counties of class two, three and four.

The Director of Revenue was originally given the duty of distributing intangible tax forms under Section 146.050, supra. This section was left in the law after the passage of House Bill No. 199. The plan of the legislature is clear. The Department of Revenue is to furnish a list of intangible taxpayers who filed a state intangible tax return the preceding year to the county treasurers of counties under a charter form of government and counties of class two, three and four. The county treasurer is given the duty of mailing the tax form to each intangible taxpayer listed by the Director and to any other person he believes to have taxable intangible property. The Director of Revenue is to supply the tax forms for the above-mentioned county treasurers. In all areas which are not counties under a charter form of government or counties of the second, third or fourth class, the Director is required to prepare and distribute a proper tax form under Section 146.050, supra. The director then is required to distribute a proper form in all counties of the first class not under a charter form of government.

You requested also information relating to the City of St. Louis. The City of St. Louis for some purposes is held to be a county of the first class not under a charter form of government. We enclose herewith an opinion written October 9, 1946 to the Honorable David A. McMullan. The City of St. Louis has also been treated in other instances as if it were not in a county. We enclose an opinion written April 2, 1956 to the Honorable Eugene P. Walsh which so indicates. We need not draw a fine distinction here since the City of St. Louis is considered either as a city not within a county or as a county of the first class not under a charter form of government. In either instance the Director would be required to distribute tax forms there under the terms of Section 146.050, supra.

We do not feel that the Director need distribute tax forms in counties under a charter form of government or in counties of class two, three or four. The legislature has specifically spelled out how the forms are to be distributed in those areas and the Director should follow the statutory requirements set out. He should not make general distribution, but must furnish forms to the proper treasurer. It is the treasurer's job to distribute the forms.

There is no specific manner set out in the law for distribution by the Director of Revenue in counties of the first class not

Honorable Milton Carpenter

under a charter form of government or in cities not within a county. We feel, therefore, that it is up to the Director to decide how and in what manner the forms are to be distributed. The mailing of forms to individual taxpayers as has been done in the past seems to us to be a logical and effective method though not specifically required by the law.

CONCLUSION.

In answer to your questions:

"1. Is the state of Missouri legally required to prepay the postage on the intangible blanks for the City of St. Louis?"

The Director is required to distribute tax forms in that area. He may, if he desires, make distribution by mailing tax forms to the taxpayer. He is not specifically required, however, to use the mails.

"2. Is the treasurer of the City of St. Louis legally required to provide and mail these blanks in the event that the state is not required to pay the postage?"

No, the duty to distribute intangible tax forms in the City of St. Louis is given to the Director of Revenue.

"3. Is the treasurer of Jackson County responsible for mailing the blanks in the event that the state in this case is not liable for prepayment of postage?"

Jackson County is a county of the first class not under a charter form of government. The Director of Revenue is given the duty to distribute the tax forms in Jackson County.

"4. Is the state required to prepay the blanks on counties under the charter form of government, for example, St. Louis County?"

The intangible tax forms should be furnished to the treasurer of St. Louis County in accordance with Section 146.055, supra.

"5. Is the state required to prepay the postage on intangible blanks for second, third and fourth class counties?"

Honorable Milton Carpenter

The Director of Revenue should furnish the tax forms to the treasurers of second, third and fourth class counties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

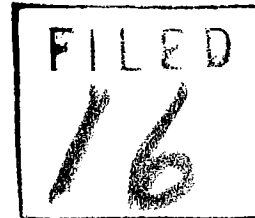
JOHN M. DALTON
Attorney General

JEC:mc

SCHOOLS:
SCHOOL DISTRICTS:
TAXES:
COLLECTORS:

- (1) In township organization counties, the township collector for each township in which a reorganized school district lies shall collect all taxes for the reorganized school district.
- (2) There is no provision in the law authorizing or permitting a city treasurer or any other city official of any city located within a legally constituted reorganized school district to collect taxes for the district.

July 27, 1959



Honorable Don Chapman, Jr.
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is in response to your request of June 2, 1959, for an opinion of this office, which request reads as follows:

"The city of Chillicothe and quite a few common school districts, have merged under the new school consolidation law into what is known as Chillicothe Reorganized District RII. The County Court of Livingston County has requested me to obtain an opinion as to whom would collect the tax money to be used for this Chillicothe RII School District. Would the township collectors collect the money in the various townships in which there is territory of the Chillicothe RII District? Would the city treasurer of Chillicothe, Missouri continue to collect the tax money for the Chillicothe RII District?"

In view of the fact that the opinion request raises no question regarding the legality of the reorganization, this opinion is based on the assumption that there has been a valid and legal reorganization.

Chapter 137, RSMo 1949, beginning at Section 137.425 and continuing through Section 137.480 relates to tax assessment in township organization counties. Section 137.470, which provides that the county clerk shall extend the tax, reads as follows:

"The county clerk shall cause to be estimated and set down in separate columns, to

Honorable Don Chapman, Jr.

be prepared for that purpose, in the copied or original assessment roll, opposite the several sums set down as the valuation of real and personal estate, the respective sums, in dollars and cents to be paid as taxes thereon, stating separately the amount of state, county, township, school, bridge and other tax."

Section 137.475 provides that the county clerk shall deliver the assessment roll to the township collector and it reads as follows:

"The county clerk shall cause a copy of the assessment roll of each township in their respective counties, with the taxes extended thereon, to be delivered to the collector of such township, on or before the day in each year, as fixed by law, when taxes become due, or, if the county court determines that a copy of the assessment roll is unnecessary, the clerk shall deliver the original assessment rolls with the taxes extended thereon to the collector."

Chapter 139, RSMo 1949, beginning at Section 139.320 and continuing to the end of the chapter outlines the duties, procedures, and mechanics of tax collections in township organization counties. The sections pertinent to the problem at hand are Sections 139.320 and 139.460 which read as follows:

"139.320. 1. To each assessment roll a warrant under the hand of the county clerk and seal of the court shall be annexed, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll, opposite their respective names; the warrant shall direct the collector, out of the moneys collected, after deducting the compensation to which he may be lawfully entitled, to pay over to the county treasurer the state and county tax collected by him.

"2. He shall pay over to the township treasurer all school moneys collected by him, and all moneys collected for township expenses, and all moneys collected for road and bridge purposes."

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"139.460. 1. The township collector shall be required to draw or procure a plat of each school district or fractional part thereof in his township, and shall keep a true and correct account of all school moneys collected by him in each school district or fractional part thereof; and when said collector pays the moneys so collected by him to the township treasurer, he shall state the amount collected from each school district or fractional part thereof, and take duplicate receipts therefor, one of which he shall retain, and file the other with the township clerk.

"2. As soon as the school funds are apportioned, the township treasurer shall apply to the county treasurer for the school moneys belonging to each school district or fractional part thereof, in his township, and the county treasurer shall pay over to him all of said school money, taking duplicate receipts therefor, one of which he shall file with the township clerk.

"3. The township treasurer shall safely keep such money until paid out upon the order of the board of directors of the various school districts in his township.

"4. When any school district is divided by township or county lines, the district shall be considered in the township or county in which the schoolhouse is located, and the township treasurer holding any money belonging to fractional parts of districts in which no schoolhouse is located shall pay over all such money to the township treasurer of the township in which the fractional part of the district having the schoolhouse is located, taking duplicate receipts therefor, one of which shall be filed with the township clerk, and the township treasurer shall settle annually with the township board on or before the twentieth day of March in each year."

It is to be noted that Section 137.470, supra, provides that in extending the tax the county clerk shall state separately the

Honorable Don Chapman, Jr.

amount of each tax, including school taxes, on the assessment roll. Section 137.475 provides that he shall then deliver the assessment roll to the collector for the collection of the taxes. Section 139.320, supra, provides that the collector shall collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll. This section further provides that each township collector shall pay over to the township treasurer all school moneys collected by him. Section 139.460 requires the township collector to keep separate the moneys collected for each school district located within the township and it further provides that he shall pay all school moneys over to the township treasurer.

In view of the language used in these sections mentioned hereinabove, we are of the opinion that where there has been reorganization, the township collector in each township wherein the reorganized district lies shall collect all the taxes for the reorganized district. There is no provision in the law which authorizes or permits a city treasurer or any other city official of any city located within a reorganized district to collect taxes for the district.

CONCLUSION

Therefore, it is the opinion of this department that:

- (1) In township organization counties the township collector for each township in which a reorganized school district lies shall collect all taxes for the reorganized school district.
- (2) There is no provision in the law authorizing or permitting a city treasurer or any other city official of any city located within a legally constituted reorganized school district to collect taxes for the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

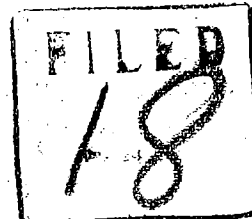
Yours very truly,

JOHN M. DALTON
Attorney General

CKH/gm/mjb/mc

TOWNSHIPS: Two or more townships may cooperate in the
building of one nursing home to serve the
NURSING HOMES: participating townships.

August 28, 1959



Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The city of Lockwood and the township board of Lockwood township have presented a question to me and I will need an opinion from your office before I can answer the inquiry.

"A Senate Bill No. 252, passed by the 7th General Assembly provides the manner by which a County or Township Board of any township may provide funds for construction and equipment of Nursing Homes. It appears that now Lockwood Township wants to join with three other adjoining townships and establish a Nursing Home to be located in the town of Lockwood. Therefore, the question I need answered, is whether or not, this Senate Bill No. 252, would permit two or more townships going together and voting bonds to provide funds for construction and equipment of ONE Nursing Home.

"This Act clearly provides for the township board of any township to provide funds for a Nursing Home but I am rather dubious about two or more townships making it a combined project. Of course this Act does not become effective until about the first of September but I will appreciate an opinion from your office by that date if convenient."

Honorable J. W. Colley

Senate Bill No. 252 enacted by the 70th General Assembly

reads:

"Section 1. Section 205.375, RSMo 1957 Supp., is repealed and one new section enacted in lieu thereof, to be known as section 205.375, to read as follows:

205.375. 1. For the purposes of this section 'nursing home' means a facility for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services.

(1) Which is operated in connection with a hospital, or

(2) In which such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the state.

"2. The county court of any county or the township board of any township may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies and services necessary to carry out such purposes.

"3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions.

"4. The county courts or township boards may provide for the leasing and renting of the nursing homes and equipment on the terms

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and conditions that are necessary and proper to nonprofit organizations for the purpose of operation in the manner provided in subsection 1."

Under the above, it is clear that a township board of trustees may erect a township nursing home and finance the construction and operation of it in the manner set out in Senate Bill No. 252.

We now direct attention to Sections 70.210 through 70.220, RSMo, Cum. Supp. 1957, which read:

Section 70.210.

"As used in sections 70.210 to 70.320, the following terms mean:

(1) 'Governing body', the board, body or persons in which the powers of a municipality or political subdivision are vested;

(2) 'Political subdivision', counties, townships, cities, towns, villages, school, county library, road, drainage, sewer, levee and fire districts."

Section 70.220.

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a

Honorable J. W. Colley

municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

The above states that a township is a political subdivision (numbered paragraph 2, Section 70.210). Section 70.220 provides that political subdivisions may cooperate in the construction and operation of any facility or public improvement or for a common service provided that the subject and purposes "shall be within the scope of the powers of such municipality or political subdivision." Since the erection of a nursing home is within the scope of the powers of a township, we believe that a number of townships may cooperate in the erection of a single nursing home for the use of the participating townships.

In such a proceeding, each participating township would vote bonds for such township, the proceeds of which would be used for the common purpose.

CONCLUSION

It is the opinion of this department that two or more townships may cooperate in the building of one nursing home to serve the participating townships.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bw

SCHOOLS:
ELECTIONS:
COUNTY SUPERINTENDENT
OF SCHOOLS:
SCHOOL DISTRICTS:

Procedure for conducting elections for
the office of county superintendent of
public schools including transmitting
the returns thereof to the county clerk.

July 29, 1959

Honorable J. V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri



Dear Mr. Conran:

We have received the request of April 13, 1959, for an opinion of this office, which request reads as follows:

"Will you please favor us with your opinion as to exactly how the election should be conducted in so far as election a County Superintendent of Public Schools is concerned? Our situation seems to be as follows:

"That in plenty of time prior to the annual school election, this Clerk contacted each school district to ascertain how many precincts would be used in their election and the maximum number of voters that could be expected to vote at each precinct. That during this procedure several of the districts brought up the question as to whether or not they could use our election supplies for recording their own elections for school board members, to which we replied that we had no objections so long as the county election was set out and one set of books and the ballots for this election were returned.

"That in due time prior to the election, this Clerk obtained two poll books, two tally sheets, return envelopes and other supplies. (This office taking the position that the 'tally sheets' mentioned in Section 167.020 would be identical to poll books and tally sheets in other elections). That not having access to the judges appointed, this Clerk had delivered to the clerks of the various school

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districts the supplies to be used in the county election.

"That the elections were duly held on the 7th., day of April, 1959, and returns were made to this office by the Judges and Clerks, or in some instances by the Members of the School Board, with the exception of one district, Reorganized School District R-6 (New Madrid), in which there was a factional row and in which the Board was advised by a local attorney.

"As to this latter mentioned district, the only returns received by this office (there being 4 precincts in the district) was the 'returns to county clerk', being a one sheet affair signed by the Judges and Clerks to the effect that the County Superintendent received so many votes; one unsealed envelope containing the ballots from one precinct; a second envelope containing unsealed ballots from the Kewanee precinct and so designated, the first mentioned one not being designated; the ballots from the large precinct, New Madrid having been declared to be lost or 'unaccounted for.' These open ballots were returned by the Superintendent of Schools and we do not know by what authority he became into custody of same.

"This school district failing to return the 'tally sheets' and the ballots within the 48 hour period, led this official to believe that it was his duty to appoint a messenger to demand the returns, which was issued and delivered to the Sheriff (a copy being hereto attached). This official assuming that it is the Chairman of the Board of Education's duty to see that he received such returns, especially since it provides a fee for him making the returns in Section 167.020. The Sheriff advised orally that he served such Writ but did not receive any returns, but has as yet made no official returns on the Writ.

"On Saturday afternoon, April 11th., 1959, this official, with two duly qualified voters

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proceeded to canvass such returns as were in his custody, declared the results and issued a commission accordingly, making note on the canvass that the R-6 returns had not been made, that demand was made for same, but that they had not been available.

"Officially that is the status of this election.

"Unofficially, the facts, as best I can gather them are that the school board conferred with a member on the staff of the State Board of Education who advised them I was not entitled to the poll books and tally sheets or 'tally sheets' as mentioned in Section 167.020, that the one sheet from the Judges and Clerks was sufficient for my purpose. Their attorney advised them likewise. Further that in the factional fight for membership on the school board, one candidate made demand after the county election was over, of the Clerk of the Board (who had custody of all the election supplies) to see three of the poll books, but was denied the privilege; then demanded to see the poll book the judge retained, and was also denied the privilege.

"The Board maintains that they are entitled to one of the poll books and tally sheets for their own use, that the other must be kept by one of the judges of the election, leaving the County Clerk in the dark, so to speak, even though the supplies were all furnished by the County of New Madrid. This side show, of course, is immaterial to this office, being strictly a district affair.

"Now it appears that the ball was fumbled somewhere along the line, and in order to see that the election of the County Superintendent of Schools is properly conducted in the future, we would like to know:

"First: Has this County Clerk proceeded properly in his duties, under the circumstances.

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"Second: Is the 'tally sheet' mentioned in Section 167.020, the same as a poll book and tally sheet set out in Section 111.510.

"Third: Is the Board of Education entitled to keep one 'tally sheet' and one of the Judges the other 'tally sheet' in this kind of election.

"Fourth: What returns are required to be made to the County Clerk to canvass and cast-up election, if any, and if so, whose responsibility is it to see that such returns are made to him.

"Fifth: If such returns, if any are required, are not made within the specified time, upon whom should the County Clerk make demand, assuming of course that he does not know what Judges and Clerks participated in the election.

"Sixth: Under the above set out circumstances, what violations have been committed and by whom, if any, especially as to making returns of the 'tally sheets', and what is the proper remedy after due demand is made and not complied with.

"Sections 167.020, 165.330, and 111.690 are all we can find on the subject, and the more we study it, the more confused we seem to be. It keeps talking relative to the 'chairman of the annual school meeting' making returns, and we can't decide who this would be, unless they are talking about rural districts, but in the other districts, the same wording appears.

"We would certainly appreciate some enlightenment for future elections, even if you have to spell it out for us."

Section 167.020, RSMo 1949, outlines, as far as it goes, the procedure to be followed in conducting the election of the county superintendent of schools, and enumerates the duties of the county clerk in connection therewith. The pertinent portion of the section applicable to the various issues raised in the request reads as follows:

Honorable J. W. Conran

"1. * * * At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the county clerk shall cause to be printed ballots with the names of the candidates who have filed declarations of their candidacy printed thereon in alphabetical order, said ballots to be substantially in the following form:

OFFICIAL BALLOT

Tuesday, April .. 19 ..

For County Superintendent of
Public Schools

(Vote for one by drawing a line through
all names except the one voted for)

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in section 111.510, RSMo 1949, relating to general elections; and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is

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counted for the persons receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. A tie vote shall cause a vacancy in the office of county superintendent, which shall be filled by appointment by the governor, and the person so appointed shall hold such office till the next annual school meeting and until his successor is elected and qualified. In case a school district is divided by a county line, the county clerk shall transmit to the president or clerk of the board of directors of such districts two sets of tally sheets and the voters residing on each side of the line shall vote separately and returns shall be made to each county as herein provided. For transmitting the returns of such election, the chairman of the annual meeting shall receive the sum of one dollar to be paid out of the incidental fund of the district.

"3. The provisions of this chapter shall, so far as practicable, apply to village and city elections so far as affects the election of county superintendent of public schools and so far as not conflicting with existing laws, which are sufficient to safeguard such elections. Any person, upon whom there is imposed an official duty by this chapter, and who shall violate any of the provisions herein, shall be deemed guilty of a misdemeanor and,

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upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment."

We note from the facts as set out in the request, that the county clerk sometime prior to the date of the county superintendent of school's election told officers of various school districts that the election supplies furnished by the county clerk in connection with the county superintendent of school's election could be used to record the results of the district elections. It would appear that this is the underlying reason for the difficulties encountered in obtaining the returns of the county superintendent of public school's election.

Section 167.020, supra, requires the county clerk to furnish to the president or clerk of the school board of the various districts in the county printed ballots and a tally sheet for use in the county superintendent of school's election. This section does not endow the county clerk with authority to grant permission for the supplies furnished by him to be used in the county superintendent of school's election to record the results of the school district election. Likewise, we are unable to find any other statute that confers such authority upon the county clerk.

162,341
162,341
162,371

There is no provision in Section 165.330, RSMo 1949, said section outlines the procedure for conducting elections in city, town, and consolidated school districts, as to who shall be custodian of the poll books used in a district election. However, that section does provide that the secretary of the school board shall make out and furnish the poll books, and further provides that the judges and clerks of the election shall certify the results of the election to the secretary of the school board. Therefore, it would appear that the poll books used in the district election should remain in the possession of the school board after the election is over. In view of the fact that the county clerk authorized the use of the tally sheets in recording the results of the district election, we can see how the secretary of the school board, in this instance, would assert a right to retain possession of the tally sheet.

Section 111.690, RSMo 1949, which applies to elections in general, and which we hold later on in this opinion to be applicable to school elections, provides that the judges of the

Honorable J. V. Conran

election shall transmit one poll book to the county clerk and retain possession of the other poll book. Inasmuch as the judges of the election used the tally sheets provided by the county clerk to record the results of the district election as well as the results for the voting of the county superintendent of schools, we can understand why the judges would claim a right to retain possession of one of the talley sheets.

(1) The opinion request contains an inquiry as to whether the county clerk proceeded properly in the exercise of his duties with respect to the last county superintendent of school's election.

The duties of the county clerk as set out in Section 167.020, supra, are as follows:

- a. Cause the ballots containing the names of the candidates for county superintendent of schools to be printed at least ten days before the annual school meeting, said ballots to conform substantially to the form set out in the section.
- b. Cause to be delivered to the president or clerk of the board of directors in the various school districts a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, the tally sheet to conform to the form of the poll book set out in Section 111.510, RSMo 1949, relating to general elections.
- c. Receive the tally sheet on which had been certified the results of the voting and the ballots from the chairman of the annual school meeting.
- d. Within five days after the annual school meeting to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote, and issue a commission to the person receiving the highest number of votes.

Based solely upon the information furnished in the request, it would appear that the county clerk carried out all of the duties, expressed and implied, required by Section 167.020, supra, with one exception, which will be discussed hereinafter.

With respect to the issuance of the demand for the tally sheets and ballots, it would appear that the county clerk acted in accordance with the statute requiring same.

Honorable J. W. Conran

Section 111.010, RSMo 1949, provided as follows:

"The provisions of this chapter which apply to all the election precincts in this state, but shall not apply to township or village elections, to school elections, or to any city elections in cities of the fourth class or of any cities under three thousand inhabitants existing under any special law."
(Emphasis ours).

This department, in interpreting Section 111.010, supra, concluded that by its provisions, Chapter 111, RSMo 1949, in its entirety, was inapplicable to school elections. However, in 1957 Section 111.010, supra, was repealed and Section 111.625, RSMo Cum. Supp. 1957, was enacted by the legislature. Section 111.625 reads as follows:

"The provisions of sections 111.390 to 111.620 apply to all election precincts in this state but do not apply to township or village elections, to school elections, to any city election in a city of the fourth class or to any election in any city of less than three thousand inhabitants existing under any special law."

28.11.62

With the repeal of Section 111.010, supra, it is our opinion that Chapter 111, RSMo 1949, except for the exclusions contained in Section 111.625, supra, now applies to school elections, unless there is some special provision elsewhere which is contrary thereto. As Section 111.690, supra, is not within the exclusions contained in Section 111.625, and is not by its own terms limited to a certain election, it is proper, and the county clerk is required to send the sheriff or another duly authorized messenger for the tally sheets and ballots if they are not returned to him within the two day period specified in Section 167.020, supra, for so doing. The only problem being the determination of the person or persons upon whom demand should be made, since the language used in Section 167.020, supra, clearly refers only to common school districts, and the procedure to be followed in city, town, or consolidated school districts is not set out.

As the question of the procedure to be followed in city, town, or consolidated districts has been raised in inquiries 4 and 5 of the request, we will discuss the matter fully when we consider those inquiries.

Honorable J. V. Conran

As to the exception noted hereinabove with respect to the county clerk's failure to properly perform the duties of his office, we would like to point out that when the returns and ballots were not received within the two day period, and were not turned over to the sheriff when the county clerk sent him to pick them up, it would appear that it is the duty of the county clerk to notify the prosecuting attorney that the law has not been complied with. It would then be up to the prosecuting attorney to take the proper legal action to obtain the returns and ballots. There is no indication that the county clerk so notified the prosecuting attorney in this instance.

(2) There is an inquiry as to whether the tally sheet, referred to in Section 167.020, supra, is the same as the poll book and tally sheet set out in Section 111.510, supra.

That portion of Section 167.020 which requires a county clerk to provide tally sheets to be used in the election of the county superintendent of schools reads as follows:

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county, a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in Section 111.510, RSMo 1949, relating to general elections; * * *." (Emphasis ours).

From the language used in that portion of Section 167.020, set out directly above, it would appear that the tally sheet mentioned therein need not be identical to the form of the poll book set out in Section 111.510, but should follow that form as nearly as possible.

Therefore, in answer to the inquiry, it is our opinion that the tally sheet mentioned in Section 167.020, supra, is the same as the poll book set out in Section 111.150, supra, except that changes in the wording should be made so as to make it practical to use in the election of the county superintendent of schools.

(3) The request contains an inquiry as to whether the board of education is entitled to keep one tally sheet and one

Honorable J. V. Conran

of the judges the other tally sheet in this kind of an election.

Section 167.020, supra, requires the county clerk to furnish a tally sheet of sufficient size to contain the names of all the qualified voters of the district. It is further provided in the section that in making the returns, the tally sheet shall be certified by the chairman and secretary of the annual school meeting and attested by the members of the board of directors who may be present, and it is made the duty of the chairman to transmit the tally sheets and ballots to the county clerk.

Section 111.500, RSMo 1949, which relates to elections in general, requires the county clerk to provide poll books for each election precinct in the county, and it specifies that two poll books shall be furnished.

From the language used in Section 167.020, supra, and in comparing that section with Section 111.500, supra, it would appear that for the election of the county superintendent of schools, the county clerk is required to provide only one tally sheet for each voting place, and that tally sheet is to be returned to the county clerk with the results of the voting certified thereon. While Section 167.020 relates only to the procedure to be followed in common school districts, we believe that only one tally sheet should be furnished for each voting place in a city, town, or consolidated school district, and that the judges of the election should transmit the tally sheet, along with the ballots, to the county clerk, as will be discussed more fully hereinafter.

(4) The opinion contains an inquiry as to what returns are required to be made to the county clerk to canvass and cast up the election, and who is responsible to see that the returns are made to the county clerk.

Section 167.020, supra, by making reference to the chairman and secretary of the annual school meeting is, by its very language, applicable only to the common school districts as to the procedure to be followed in electing the county superintendent of schools. The statute specifically provides that the chairman and secretary of the annual school meeting shall certify the returns on the tally sheet furnished by the county clerk, and that the chairman has the further responsibility of seeing that the tally sheet and ballots are returned to the county clerk.

As to the town, city, and consolidated districts, we have been unable to find a statute which specifies how the returns

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in the election of the county superintendent of schools are to be made, and which places the responsibility on any person or office to make such returns. Likewise, we have not found any cases in which the courts have been called upon to consider the problem of how the returns in such districts are to be made and who has the responsibility of transmitting them to the county clerk. Section 167.020, supra, as pointed out above, is applicable only to common school districts with respect to the procedure for making returns and vesting the duties therefor.

The manner in which elections in city, town, and consolidated school districts shall be conducted is governed by Section 165.330, supra. The portion of that section which is pertinent to our discussion herein reads as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at seven o'clock a.m. and closing at six o'clock p.m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records." (Emphasis added).

Nowhere in Section 165.330, supra, has the legislature in any way mentioned how, or by whom, returns of the voting for the office of county superintendent of schools shall be made. The only provision pertaining to the reporting of results of election held in such a district is that portion which requires the judges and clerks to certify the results to the secretary of the board of education, who shall record same and by authority

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of the board issue certificates of election to the persons entitled to receive them. There is no mention of transmitting the results of the voting for the office of the county superintendent of schools to the county clerk.

Section 111.690, supra, which pertains to elections in general provides that:

"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail by their discretion to the clerk of the county court in which the election was held within two days thereafter;* * *the other poll book shall be retained in the possession of the judges of the election open to the inspection of all persons;* * *"

As we have concluded hereinabove that this section is applicable to school elections, it is our conclusion, until such time as the legislature shall enact legislation filling the void in the law as to who has the duty to make the returns of the election of the county superintendent of public schools to the county clerk, that the judges of the election are responsible for transmitting the returns to the county clerk.

This conclusion is further borne out by the fact that Section 111.255, RSMo Cum. Supp. 1957, provides that all elections held in a subdivision on the same day are to be held at the same polling place with the election officials at that polling place to be charged with the responsibility of conducting all elections. This section reads as follows:

"Notwithstanding any other provisions of law, whenever any primary, general or special elections, or elections held by any school district, fire protection district, sewer district, municipalities, or other political subdivision of the state, are held upon the same day in any political subdivision, one polling place for the several elections in each precinct, consolidated precinct or district in the political subdivision shall whenever feasible be designated by the county clerk, board of election commissioners, or other proper election official, having authority over general elections in the political subdivision and the election officials in the polling places shall be designated by the county

Honorable J. W. Conran

clerk, board of election commissioners or other proper election official and shall be compensated for one election only. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

(5) The request makes inquiry as to whom the county clerk shall make demand upon if the returns are not made within the specified time.

Section 167.020, supra, definitely makes it the duty of the chairman of the annual school meeting to transmit the tally sheet upon which the results of the voting for the office of county superintendent of schools has been certified, together with the ballots, to the county clerk within two days after the meeting. Therefore, where a common school district is involved, the demand should be made upon the chairman of the annual meeting.

As pointed out hereinabove, the legislature has neglected to specifically place the duty upon any person or office in a town, city, or consolidated school district to transmit the tally sheet, upon which the results of the voting have been certified, together with the ballots, to the county clerk. However, as we concluded in inquiry number 4 above, that until the legislature shall enact legislation to provide the procedure to be followed in city, town, and consolidated school districts in electing a county superintendent of public schools, we are of the opinion that Section 111.690, RSMo 1949, is applicable and that it is the duty of the judges of the election to transmit the tally sheet and ballots to the county clerk. Therefore, when a town, city, or consolidated school district is involved, the demand should be made upon the judges of the election. = 111.551

CONCLUSION

Therefore, it is the opinion of this department that:

(1) The county clerk does not have authority to grant permission to school districts to use the tally sheet provided by him for use in the election of the county superintendent of schools to record the results of the school district election.

(2) The duties of the county clerk in connection with the election of the county superintendent of schools are outlined in Section 167.020, RSMo 1949, and Section 111.690, RSMo 1949, and are as follows:

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(a) Cause the ballots to be printed at least ten days before the day of the election.

(b) Cause printed ballots and tally sheets to be delivered to the president or clerk of the board of education of the various school districts.

(c) Receive the election returns from the various school districts.

(d) Within five days after the election cast up the vote and issue a commission to the person receiving the highest number of votes for the county superintendent of schools.

(e) If returns of the election are not received within two days following the election, send the sheriff or another duly authorized messenger for the returns, and if the sheriff or other duly authorized messenger is not able to obtain the returns, then notify the prosecuting attorney that the law has not been complied with.

(3) The tally sheet mentioned in Section 167.020, RSMo 1949, is the same as the poll book set out in Section 111.150, RSMo 1949, except that changes in the wording should be made where necessary to make it practical to use in the election of the county superintendent of public schools.

(4) The county clerk is required to furnish only one tally sheet for each voting place, and this tally sheet must be returned to the county clerk with the results of voting certified thereon.

(5) The returns for the election of the county superintendent of schools are to be made upon the tally sheet furnished by the county clerk. It is the duty of the chairman of the annual school meeting in a common school district to transmit the returns from the county clerk while in a city, town, or consolidated school district the returns are to be transmitted to the county clerk by the judges of the election.

(6) If the results of the voting for the office of the county superintendent of schools are not received by the county clerk within two days following the election, as required by Section 167.020, supra, the county clerk should send the sheriff or another duly authorized messenger for the tally sheets in accordance with Section 111.690, RSMo 1949. In a common school district the sheriff or duly authorized messengers should

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present the demand to the chairman of the annual school meeting, while in a town, city, or consolidated school district the demand should be presented to the judges of the election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

John M. Dalton
Attorney General

CKH/mjb

BANKS AND BANKING:
LOANS:
NOT-FOR-PROFIT CORPORATIONS:

A bank organized under Chapter 362, RSMo 1949, may purchase bonds issued by a not-for-profit corporation in an amount not in excess of the prohibition imposed by Section 362.170, RSMo 1949.

April 6, 1959



Honorable James Clifford Crouch
Representative, Taney County
House of Representatives
Jefferson City, Missouri

Dear Sir:

On March 19, 1959, you wrote to this department as follows:

"At the suggestion of Mr. O'Malley, I herewith submit to you the following hypothetical situation, for your interpretation:

- A. Presbyterian Church, organized under the Not-for-Profit laws of Missouri, plans to sell bonds to local people in the amount of \$25,000 for the purpose of constructing an addition to the church.
- B. A bank organized under Chapter 362 Revised Statutes of Missouri, 1949, desires to purchase a portion of said bonds, in the amount of \$5,000 at 5% interest callable in 5 years. Under Section 362.105 (1), and in particular, by virtue of the phrase '...including bonds...' can said bank purchase these bonds?

"I would appreciate a letter or memorandum on this particular question as quickly as possible."

We direct attention to the following portion of Section 362.105, RSMo 1949:

"Every bank shall be authorized and empowered:

Honorable James Clifford Crouch

(1) To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral of personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain the interest in advance; provided, however, that no bank shall maintain in this state a branch bank, or receive deposits or pay checks except in its own banking house;" (Emphasis ours.)

The above portion of Section 362.105 and the portion of the section which follows constitute a grant of authority to banks. Under that grant of authority, it will be noted from the quoted portion of the section that banks are authorized to buy bonds.

Section 362.170, RSMo 1949, sets forth certain limitations upon the grant of authority given under Section 362.105, supra. We particularly direct attention to the following portion of the section:

"A bank subject to the provisions of this chapter:

(1) Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letter of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual, partnership, corporation, or body politic an amount or amounts in the aggregate which will exceed fifteen percent of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty per cent of the capital stock actually paid in and surplus fund of such bank if located in a city having

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a population of less than one hundred thousand and over seven thousand; and twenty-five per cent of the capital stock actually paid in and surplus fund of such bank if located elsewhere in the state, with the following exceptions: "

We shall not quote the remainder of this section because of its very considerable length.

In our consideration of this matter, we assume that the corporation in question, to wit, a Presbyterian Church organized under the not-for-profit laws of Missouri, is authorized to issue the bonds to which you refer. As we stated above, Section 362.105 gives to banks the authority to purchase bonds. As we also pointed out, Section 362.170, supra, places certain limitations upon the grant of authority given in Section 362.105. It is our belief that a bank may purchase such bonds as you refer to, subject to the limitations set forth in Section 362.170.

CONCLUSION

It is the opinion of this department that a bank organized under Chapter 362, RSMo 1949, may purchase bonds issued by a not-for-profit corporation in an amount not in excess of the prohibition imposed by Section 362.170, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

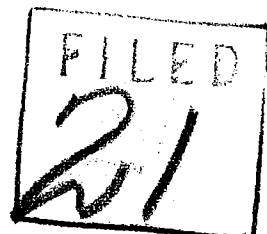
John M. Dalton
Attorney General

HPW:hw

ASSESSORS:
TAXATION:
COUNTIES:
PERSONAL PROPERTY:

County assessor cannot require a listing of ~~property~~ "per room" with a valuation on each room, in addition to the statutory itemization of personal property.

February 25, 1959



Honorable E. Gary Davidson
Missouri State Senate
Jefferson City, Missouri

Dear Senator Davidson:

You have recently requested from this office an opinion concerning the tax assessment blank currently being used by Francis H. Kennedy, Assessor of St. Louis County, Missouri. The questions which you ask, paraphrased and consolidated, are as follows:

May the assessor require the taxpayer, when making a list of his taxable personal property, to itemize his property, which itemization includes a catch-all such as "all other personal and household property," and also require the taxpayer to indicate the number of rooms he occupies and set a minimum assessment per room based upon the condition of the contents thereof?

Section 137.120, RSMo 1949, requires that such a list of property shall contain certain items. It is, apparently, under this authority that the assessor of St. Louis County required the itemization of television sets, radios, refrigerators, etc., in Section 4 of the blank. This, of course, is proper and follows the scheme set up in said section of the statute. This blank then requires an indication of the "number of rooms occupied" and sets up a table for the valuation of such rooms as follows:

"@ \$200 & up (New Condition)
@ \$100 & up (Good Condition)
@ \$ 50 & up (Fair Condition)
@ \$ 25 & up (Poor Condition)"

Honorable E. Gary Davidson

It will be noted that in the itemization above are such general classifications as "Home and Garden Furniture" and "all other personal or household property." Thus, if the taxpayer properly filled out the itemization portion of this blank he would have listed for assessment all of the personal household property and the valuation by room would be a duplication.

Such valuation by room, either with or without a minimum valuation per room, is not authorized by the statute. Further, when the taxpayer lists his property, it is his duty to place a value thereon and the assessor may not fix either a maximum or a minimum. Consequently, it would appear that that part of the blank calling for listing of personal property by room is unauthorized by law, and the taxpayers may not be required to complete this portion of the assessment blank. The taxpayer is, of course, required to list all of his property for assessment, and such result will be obtained when the itemized portion of the blank is properly filled in.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the assessor of St. Louis County may not require a return of personal household property on the basis of the number of rooms occupied and a valuation per room, and that a taxpayer who properly fills out the remainder of the blanks and ignores this "per room" provision has properly listed his property for assessment as required by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:lcmw

CONDEMNATION: Iron County cannot legally pay to a
landowner additional compensation for
STATE HIGHWAY COMMISSION: his land which was condemned by the
state highway commission for a state
road in an action in which final
COMPENSATION: judgment of condemnation was entered
on September 5, 1957.
COUNTY COURTS:

July 16, 1959

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"I would like to have an official opinion on a problem presented to me by the County Court of Iron County relative to condemnation of road right-of-ways.

"On June 5, 1957, the State Highway Commission filed a condemnation suit in the Circuit Court of Iron County against a number of Iron County residents to condemn a right-of-way for road purposes, the style of the case being State of Missouri, ex rel State Highway Commission, of Missouri vs. Ray Jennings, et al. The only party involved here was personally served and the cause set for hearing on July 3, 1957. Commissioners were appointed on that day and the property condemned was appraised. The Report of Commissioners was filed on July 9, 1957, and the money compensating said residents was paid into the office of the Circuit Clerk on said 9th day of July, 1957. Thereafter, no exceptions were filed to said Report of Commissioners and final judgment of condemnation was entered on the 5th day of September, 1957.

"Since that day one of the defendants has tried in every manner possible to obtain more compensation for the land condemned on his tract. On this date, June 1, 1959, said defendant presented a petition to the

Honorable George Q. Dawes

County Court signed by perhaps 12 or 15 residents asking that the Court pay him an additional sum for the land taken from him.

"The County Court asked my opinion on the matter and it was to the effect that said Court was without authority to allow defendant more compensation than was awarded under the final decree of the Circuit Court. However, if the Court decided that the defendant was not sufficiently compensated for the loss of his land, could it legally pay him a sum in excess of the award of the Commissioners?"

"I will appreciate your opinion on this matter as soon as possible as I am sure that the County will become more involved than it is at the present time. Thank you for your cooperation."

Section 227.120, RSMo 1949, states in part:

"The state highway commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the following purposes when necessary for the proper and economical construction and maintenance of state highways:

"(1) Acquiring the right of way for the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof."

Numbered paragraph 13 of the above section states that if condemnation becomes necessary that the state highway commission shall have the power to proceed to condemn such lands in accordance with the provisions of Chapter 523, RSMo 1949.

Chapter 523, supra, sets forth the manner in which the petition for condemnation shall be filed, which petition shall include a request that three disinterested freeholders be appointed to assess the damages which will be sustained by the landowners whose property it is sought to condemn. The chapter then proceeds to outline the procedure which follows the filing

Honorable George Q. Dawes

of the petition. Section 523.050 reads:

"1. Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the clerk's office, within ten days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisalment, upon good cause shown.

"2. Such new appraisalment shall, at the request of either party, be made by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to erect said telephone or telegraph line, or construct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed. In all cases arising under the provisions of this chapter, the report of commissioners, when signed by a majority of them, shall be taken and considered as the report of all."

In your letter you state that this section was not complied with inasmuch as no exceptions were filed to the report of the commissioners in this specific case, and that final judgment of condemnation was entered on the fifth day of September, 1957. In the case of the City of St. Louis vs. Pandjiris Weldment Co., 270 SW2d 17, at l.c. 18, the Missouri Supreme Court stated that: "Under the charter of the City of St. Louis, if there be a failure to timely demand a trial by jury, the commissioners have exclusive authority to assess the damages and their award has the effect of a jury verdict."

It will be noted that this holding was with respect to the charter of the City of St. Louis, but we believe that the same principle of law is applicable in this instance and that the effect of a commissioner's report, which was not excepted

Honorable George Q. Dawes

to and which became final, is in the same legal position as the verdict of a jury. Thus it seems clear that the landowner in this instance has no action against the state highway department, and indeed he does not purport to have any. We have emphasized this phase of the matter because we wish to make it clear that the movant in this matter was a state agency, to wit, the state highway department, moving to condemn property for state purposes, to wit, a state road. Presumably the report of the commissioners, to which no exceptions were filed, represented a fair price for the land which was taken. To say the least the landowner is now unable, legally, to assert the contrary.

In this regard we direct attention to 15 C. J., Section 264, Page 562, which reads in part:

"One who asks payment of a claim against a county must show some statute authorizing it or that it arises from some contract express or implied which finds authority of law. In other words, no claims are chargeable on a county treasury nor can they be paid therefrom except such as the law imposes on the county or empowers it to contract for, either expressly or as a necessary incident, and no officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive from them, and where a statute prescribes that certain things shall be done at the expense of the county by certain officials of the county, or by persons designated by them, only such officials or persons designated can put the county to expense for such items."

In this connection we direct attention to the case of State ex rel. vs. Clark, State Auditor, 57 Mo. 25. This was a case where an application for a mandamus was made to compel the State Auditor to issue a warrant on the treasury for the amount of a bill for board and lodging of a petit jury in the trial of a capital case. The Auditor refused to allow such an item on the ground that he had no authority by law to do so. The court held that there was no such statute authorizing the State Auditor to make such a payment and that, therefore, he was correct in

Honorable George Q. Dawes

refusing, thus laying down the principle that state moneys should be paid only when there is direct statutory authority for so doing.

In the case of Bright vs. Pike County, 69 Mo. 519, one Coe was indicted for murder in the Circuit Court of Pike County, was tried in Marion County on a change of venue, and the expense of boarding the jury was taxed as cost against Pike County by the Circuit Court of Marion County. Pike County refused to pay the bill on the ground that there was no statutory authority for them to do so. The Missouri Supreme Court held that they were correct in so refusing.

In the case of Person vs. Ozark County, 82 Mo. 491, the matter in issue was also the payment for the cost of boarding a jury. There the court stated, l.c. 492:

"In 1880, the subject matter of the claim passed upon by the county court, could not be made the basis of a lawful demand against the county. There being no authority whatever, under any circumstances, for such an allowance, as was made to the sheriff of Oregon county, the warrant drawn in pursuance thereof was a nullity. It was a mere gratuity, and cannot be enforced against the county. The failure of the legislature to make provision for the payment of such necessary expenses as were incurred by the sheriff in this case, was doubtless an accidental omission, as they are now provided for by the act of March 8th, 1883, (Sess. Acts 1883, p. 80); but this fact cannot alter our judgment, which must follow the law in force at the time the warrant was issued."

We believe that the above establishes the principle that public moneys should be paid only when there is clear statutory authority for so doing. We do not believe that in the instant case there is such authority for the County Court of Iron County to make the payment requested.

Honorable George Q. Daves

CONCLUSION

It is the opinion of this department that Iron County cannot legally pay to a landowner additional compensation for his land which was condemned by the state highway commission for a state road in an action in which final judgment of condemnation was entered on September 5, 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:gm/bjw

COUNTY SUPERINTENDENT OF SCHOOLS:
COUNTY COURT:
COUNTIES:
SCHOOLS:

When office of county superintendent of schools vacant, clerical assistant to county superintendent may not be employed nor may any other person be employed to perform duties of county superintendent.

October 23, 1959

FILED

21

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Davenport:

This is in response to your request for opinion dated September 24, 1959, which reads as follows:

"We have an unusual situation in this County. The County Superintendent of Schools has resigned and left the country. His Clerk or Secretary has been retained to keep the office open pending appointment. At first this was strictly temporary but we now understand that the Governor has indicated that he may not make any appointment of a County Superintendent of Schools in this County in the foreseeable future. We have a need for the office to be kept open and certain routine duties to be kept to date.

"A part of the Secretary's salary is paid by the State of Missouri.

"Our questions are:

"1. Can the County Court legally retain the services of the Secretary and keep the office open where no County Superintendent of Schools occupies office?

"2. Will the State of Missouri pay its part of the salary of such Secretary under these conditions."

Honorable Bill Davenport

Christian County being a county of the fourth class, the applicable statute is Section 167.270, RSMo Cum. Supp. 1957, which reads as follows:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than one thousand five hundred dollars annually to be determined and fixed by the county court, seven hundred and fifty dollars of which shall be paid by the state out of state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state; provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage, shall be seven cents per mile for each mile actually and necessarily traveled; provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services, and in no case shall the county superintendent personally receive any part thereof."

Honorable Bill Davenport

It is to be noted that by the above statute the county superintendent of schools is permitted to employ clerical assistance. In the presentation of a bill by such a clerical employee of the county superintendent, it is further provided that such bill shall first have been approved by the county superintendent before a warrant is issued. Since only the county superintendent of schools and not the county court is permitted to employ such an assistant and the bill for services of such employee must be approved by him, we see no way that a clerical assistant to the county superintendent of schools can be employed when there is no one holding the office of county superintendent of schools.

The next question would be whether the county court could employ a person not designated as clerical assistant to the county superintendent of schools to perform the duties imposed by law upon the county superintendent of schools. In that connection, we are enclosing herewith a copy of an opinion of this office issued to J. W. Thurman, dated March 22, 1951, wherein it was concluded that there was no authority for the county court to appoint a person to carry out part of the duties imposed by law upon the county highway engineer. Also in the enclosed opinion issued to Edward V. Long, dated February 24, 1939, it was held that the county court could not appoint a person to perform duties imposed by law upon constables even though all the constables had resigned and refused to serve.

A county court is only the agent of the county with no powers except those granted and limited by law and, like other agents, it must pursue its authority and act within the scope of its powers. *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. 2d 996, 999 [5-7]. The routine duties to which you refer in your letter are those imposed upon the county superintendent of schools and not upon the county court. There is no statute authorizing the county court to appoint or employ some person to carry out the duties imposed upon the county superintendent of schools nor may such authority be reasonably implied from any power expressly granted to the county court. Therefore, we are of the opinion that the county court may not employ and pay some person to perform duties imposed by law upon the county superintendent of schools.

The State Board of Education is directed by Section 167.270, RSMo Cum. Supp. 1957, to include in its August apportionment of school moneys the sum of \$750.00 as the state's portion of the salary of the county superintendent's clerical assistance. This obligation is imposed upon the State Board of Education regardless

Honorable Bill Davenport

of the fact that in some instances this sum cannot or may not be used for the purpose. Consequently, the amount of \$750.00 thus provided will be included in the August apportionment of school moneys but, as shown in the enclosed opinion to Haskell Holman, dated August 11, 1958, if it is not used for the purpose of paying a clerical assistant to the county superintendent of schools, it should be returned to the state at the end of the fiscal year.

CONCLUSION

It is the opinion of this office that when there is a vacancy in the office of county superintendent of schools, there is no authority for the county court to employ a clerical assistant to the county superintendent of schools, nor is there any authority for the county court to employ any other person to carry out duties imposed upon the county superintendent of schools. The \$750.00 provided by statute for clerical assistance to the county superintendent of schools will continue to be sent to the county as part of the August apportionment of school moneys, but if it cannot be used for the purpose of paying for clerical assistance to the county superintendent of schools, it is to be returned to the state at the end of the fiscal year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:mc
Enclosures

DEPARTMENT OF CORRECTIONS: Teachers employed by State Board
PUBLIC SCHOOL RETIREMENT SYSTEM: of Training Schools members of
STATE BOARD OF TRAINING SCHOOLS: Public School Retirement System
DEPT. OF PUB. HEALTH & WELFARE: and teachers employed by Division
SCHOOLS: of Inmate Education of Department
of Corrections to become members
of Public School Retirement System
when House Bill No. 258, 70th
General Assembly, becomes effective

July 31, 1959



Mr. G. L. Donahoe
Executive Secretary
Public School Retirement
System of Missouri
Jefferson Building
Jefferson City, Missouri

Dear Mr. Donahoe:

This is in response to your request for opinion dated
June 16, 1959, which reads as follows:

"House Bill No. 258 as adopted by the last
session of the General Assembly and approved
by the Governor repeals Section 169.130,
Revised Statutes of Missouri, 1957, and
enacts in lieu thereof one new section, No.
169.130.

"Section 169.130 was first adopted in 1947
for the purpose of providing membership in
the Retirement System for the full-time
certificated teachers employed by the State
Board of Training Schools. This section
was repealed and a new section enacted in
1953 to provide membership in the Retirement
System for the full-time certificated
teachers employed by a division of the State
Department of Public Health and Welfare.
This section provided for the membership of
the full-time certificated teachers of a
division of the State Department of Public
Health and Welfare when the teachers render
services in a school whose standards of
education are set and which is supervised
by a public school officer of the county or
by the State Department of Education. Sub-
section 2 was added to Section 169.130 in
1957, but the content of subsection 1 was
not altered.

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"The wording used in the re-enacted section (Section 169.130) leaves question as to whether or not the full-time certificated teachers employed by the Division of Inmate Education of the Department of Corrections will become members of the Public School Retirement System of Missouri by virtue of employment. There also is question as to the status of the certificated teachers employed on a full-time basis by the State Board of Training Schools.

"We are unable to find that there is a statutory requirement that standards of education be set by a public school officer of the county or by the State Department of Education in schools maintained by the Division of Inmate Education of the Department of Corrections, or that there is statutory provision for the supervision of such schools by a public school officer of the county or by the State Department of Education.

"For our guidance in administration, we wish to request an official opinion which will answer the following:

1. Will the certificated teachers who are employed on a full-time basis by the State Board of Training Schools continue to be members of the Public School Retirement System of Missouri by virtue of their employment?

2. Under the provisions of House Bill No. 258, will the certificated teachers who are employed on a full-time basis by the Division of Inmate Education of the Department of Corrections become members of the Public School Retirement System of Missouri by virtue of their employment?"

House Bill No. 258 of the 70th General Assembly, to which you refer, repealing Section 169.130, RSMo, Cum. Supp. 1957, and enacting a new section in lieu thereof, reads as follows:

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"1. Any person, duly certified under the law governing the certification of teachers, employed full time as a teacher by the state board of training schools, by the division of inmate education of the department of corrections, or by a division of the state department of public health and welfare and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the state department of education is a member of the public school retirement system of Missouri. Any such person who becomes a member before the end of the school year next following the effective date of this section may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid from appropriations to the institution by which the member is employed.

"2. Any person, duly certificated under the law governing the certification of teachers, employed full time by any state-wide non-profit educational association or organization serving on an educational professional basis through its membership the active members of the public school retirement system of Missouri or the public school districts maintaining high schools in this state, may be a member of the public school retirement system of Missouri. Any such person who becomes a member before July 1, 1955, may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid by the association or organization."

The only change made therein is the addition of the words, "by the division of inmate education of the department of corrections."

In order to arrive at the answers to your questions it is necessary to determine whether the qualifying clause, "and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the state department

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of education," refers only to those teachers employed by a division of the State Department of Public Health and Welfare or whether it also refers to those employed by the State Board of Training Schools and by the Division of Inmate Education of the Department of Corrections.

In arriving at this determination, we are guided by certain well-established rules of statutory construction. For example, in *State ex rel. Crow v. City of St. Louis*, 174 Mo. 125, 73 SW 623, 628, the court said:

"But it is said that the general rule of law is that, in the absence of punctuation showing a different intent, an exception or proviso in a statute applies only to its immediate antecedent in the statute, and therefore the exception in this section applies only to the fifth class of subjects. Sutherland on Statutory Construction, § 267, thus states the rule: 'Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision or clause immediately preceding.' But, after referring to the cases illustrative of the general rule, the author, in the same section, adds: 'This principle is of no great force. It is only operative when there is nothing in the statute indicating that a relative word or qualifying provision is intended to have a different effect. And a very slight indication of legislative purpose, or a parity of reason, or the natural and common-sense reading of the statute may overturn it, and give it a more extended application. * * * Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it. * * * Where the intention is manifest, a proviso or qualifying words or clauses found in the middle of a sentence may be placed at the end; or, when inserted in one section, they may be applied to the matter of another section.' The many cases cited in the notes to the text afford ample illustration of the many instances

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in which the general rule has found exceptions. In fact, the exceptions have been applied oftener than the rule. Dwarria's Treatise on Statutes (2d Ed.) p. 600, says: 'When words are at the beginning of a sentence, they may govern the whole. * * *

'When words are at the end of a sentence, they may refer to the whole. Thus, the words, "per legem terrae," in Cap 29 of Magna Charta, being towards the end of the chapter, have been always held to refer to all the precedent matter. But if words are in the middle of a sentence, and sensibly apply to a particular branch of it, can they be extended to that which follows? Agreeably to reason, and in grammatical construction, it would seem not; but, as statutes are read without breaks and stops, it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the context to what they relate; and they are often, as will be seen, to be read distributively - "reddendo singula singulis." Sedgwick on the Construction of Stats. (2d Ed.) p. 226, says: 'A limiting clause is generally to be restrained to the last preceding antecedent.' The author cites in support of this statement the case of Cushing v. Worrick, 9 Gray, 382, but omits the very important words of that decision which complete the part of the sentence wherein the rule stated is laid down, which are, 'unless there is something in the subject-matter which requires a different construction.' Id. p. 385. But the same author (page 225) says: 'Common sense should prevail over strict grammatical rules, and punctuation should not control. Gyger's Estate, 65 Pa. 311. The punctuation of a statute is not to be considered. Cushing v. Warrick, 9 Gray, 382; Hamilton v. Steamboat Hamilton, 16 Ohio St. 428.'

In State ex rel. Gorzik v. Mosman, Mo. Sup., 315 SW2d 209, 211, the following guides were set forth:

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"When called upon to construe a statute, the court's prime duty is to give effect to the legislative intent as expressed in the statute. To this end we are guided by certain well established and recognized rules, among which are the following: (a) The object sought to be obtained and the evil sought to be remedied by the Legislature; (b) the legislative purpose should be assumed to be a reasonable one; (c) laws are presumed to have been passed with a view to the welfare of the community; (d) it was intended to pass an effective law, not an ineffective or insufficient one; (e) it was intended to make some change in the existing law. Warrington v. Bobb, Mo. App., 56 S.W. 2d 835, 837; 82 C.J.S. Statutes § 316, pp. 544, 545."

Another rule is stated in State v. Eckhardt, 232 Mo. 49, 133 SW 321, 322:

" * * * The great fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. For the purpose of discovering the legislative intent, it is proper, and often necessary, to consider the history of the statute, the reason for its enactment, and the prior state of the law on the subject to which the statute relates. * * *"

In construing this statute, we are to consider the qualifying clause, "and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the state department of education," as referring solely to the last antecedent, i.e., teachers employed by a division of the State Department of Public Health and Welfare unless a contrary intention appears.

Prior to the original enactment of Section 169.130, RSMo, this office rendered an opinion to you, dated August 25, 1947, wherein it was concluded that teachers in the State Training Schools and in the State Sanatorium at Mount Vernon were not members of the Public School Retirement System. Following that, the General Assembly enacted Senate Bill No. 288, 64th General Assembly (Laws of Mo. 1947, Vol. II, p. 325, §15), which became

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Section 169.130, RSMo. That bill, as enacted, provided membership in the Public School Retirement System for certificated teachers employed full time by the State Board of Training Schools without qualification. In 1953, that section was again amended by the addition of the words, "or employed full time as a teacher by a division of the State Department of Public Health and Welfare and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the State Department of Education." It also added Subsection 2 thereof, not pertinent to this discussion (House Bill No. 64, 67th General Assembly, Laws of Mo. 1953, p. 480). Obviously, the qualifying clause added in 1953 referred only to the teachers employed by a division of the State Department of Public Health and Welfare and not to those employed by the State Board of Training Schools.

In 1955, the 68th General Assembly created a Division of Inmate Education within the Department of Corrections (House Bill No. 377, 68th General Assembly, Laws of Mo. 1955, p. 318, §47). On March 26, 1956, this office rendered an opinion to Honorable James D. Carter, copy enclosed, in which it was concluded that the teachers employed by the Division of Inmate Education of the Department of Corrections were not members of the Public School Retirement System.

The 70th General Assembly has enacted House Bill No. 258, adding to Section 169.130 the words, "by the division of inmate education of the department of corrections."

This history clearly indicates an intention on the part of the Legislature to include the certificated teachers employed full time by the Division of Inmate Education of the Department of Corrections as members of the Public School Retirement System. Conversely, no intention appears therefrom which would lead us to deviate from the general rule that qualifying phrases or clauses refer only to the last antecedent. If this statute were construed otherwise, and if it were said that those certificated teachers employed full time by the Division of Inmate Education of the Department of Corrections were not eligible for membership because the school in which they teach is not supervised by a public school officer of the county in which the school is located or by the State Department of Education, the Legislature would have done a useless thing by adding to this section the words, "by the division of inmate education of the department of corrections." It would not result in any change in the existing law.

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Based upon the various rules of statutory construction above noted and the history of this legislation, we are of the opinion that the qualifying clause above mentioned refers only to those teachers employed by a division of the Department of Public Health and Welfare and not to those employed by the State Board of Training Schools or by the Division of Inmate Education of the Department of Corrections.

CONCLUSION

It is the opinion of this office that certificated teachers employed full time by the State Board of Training Schools will continue to be members of the Public School Retirement System of Missouri and that certificated teachers employed full time by the Division of Inmate Education of the Department of Corrections will become members of the Public School Retirement System of Missouri when House Bill No. 258 of the 70th General Assembly becomes effective.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

JUVENILE COURT:
JUVENILE CODE:
DIV. OF MENTAL DISEASES:

Juvenile court may retain jurisdiction of child until age of twenty-one. Juvenile committed to state mental hospital may be released by head of hospital. If released while under jurisdiction of juvenile court, child is to be returned to committing court for further disposition.

July 8, 1959



Dr. Addison M. Duval
Director
Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Dr. Duval:

This is in response to your request for opinion dated June 3, 1959, which reads, in part, as follows:

"Over the past several months we have had from time to time questions raised relative to the proper interpretation of provisions of the new Juvenile Code. I would appreciate your kind assistance at this time in helping us understand some of the legal implications.

"Under the new Juvenile Code of Missouri what is the legal responsibility, respectively of the committing court and the hospital? Specifically, when a juvenile court commits a youngster to us is it then the intent of the law that we clear with the committing court prior to making any disposition of the case, such as convalescent or trial leaves, week-end passes or other short periods of leave, and ultimate discharge. Also, specifically, if a juvenile court commits a youngster to us under the age of seventeen and subsequently, while a patient in one of our hospitals, the patient becomes over seventeen years of age, does the court still have jurisdiction until the age of twenty-one?"

Dr. Addison M. Duval

With respect to the jurisdiction of the juvenile court, Section 211.041, RSMo, Cum. Supp. 1957, provides:

"When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of this chapter in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of this chapter until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools."

(Emphasis ours.)

Prior to the enactment of Senate Bill No. 15 of the 69th General Assembly, the present Juvenile Code, and at the time of the decision of the Supreme Court of Missouri in *State ex rel. Menth v. Porterfield*, Mo. Sup., 264 SW 386, the law conferring jurisdiction on juvenile courts provided that "When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of Sections 211.010 to 211.300, until the child shall have attained its majority. * * *" (§211.010, RSMo 1949.) In spite of this seemingly mandatory provision, the court, in the *Porterfield* case, held that the court could divest itself of jurisdiction by an order affirmatively limiting the period of the child's wardship to a specified period which expired before the child reached his majority.

The only difference in this respect between the law now and the law as it was prior to the enactment of Senate Bill No. 15 is that, in view of the permissive language of Section 211.041, supra, the court's order disposing of the child must affirmatively show an intention to retain jurisdiction of a child either by express language or necessary inference if, in fact, the court does intend for its jurisdiction to continue. If the court's intention with respect to jurisdiction over the child does not clearly appear in its order of commitment, we suggest that you correspond with the committing court and seek clarification thereof.

Section 211.201, RSMo, Cum. Supp. 1957, provides expressly that if a child under the jurisdiction of the juvenile court is found to be feeble-minded, epileptic, mentally defective or

Dr. Addison M. Duval

otherwise mentally disordered, the court may commit such child to the Missouri State School, the St. Louis Training School, or other state hospital or institution under such conditions as the court may prescribe. The language, "other state hospital," is broad enough to encompass a hospital within the Division of Mental Diseases.

If a child is committed by the juvenile court to a hospital within the Division of Mental Diseases and in its order of commitment the court has specified certain conditions, those conditions are binding on the hospital because the rest of Section 211.201 says that the order of commitment shall be binding upon the hospital or institution to which the child is committed.

Section 211.231, RSMo, Cum. Supp. 1957, provides that all commitments made by the juvenile court shall be for an indeterminate period which shall not continue beyond the child's twenty-first birthday; that the court shall give to the institution or agency a summary of its information concerning the child; and that the institution or agency shall give to the court such information as the court may require from time to time so long as the child is under the jurisdiction of the juvenile court. Here again, the duration of the court's jurisdiction over a child committed to a hospital within the Division of Mental Diseases will be shown in the court's order of commitment.

It should be mentioned parenthetically that Section 211.251, RSMo, Cum. Supp. 1957, vests the juvenile court with the authority to modify its decree at any time. It is axiomatic that a court must have jurisdiction over a person or thing before it can either enter or modify a judgment or order with respect thereto. 15 C.J., Courts, Section 14, page 826. Consequently, this section must be read in the light of Section 211.041, supra, so as to authorize the court to modify its order with respect to a child at any time during which it has retained jurisdiction over that child.

If the court commits a child to an institution within the Division of Mental Diseases and does not retain jurisdiction over the child, obviously someone must have the authority to discharge the child or release him on convalescent status when conditions warrant such action. Sections 202.827 and 202.830, RSMo, Cum. Supp. 1957, would seem to vest this authority in the head of the hospital.

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Even though the juvenile court does retain jurisdiction over a child committed to a hospital within the Division of Mental Diseases, we do not glean from these statutes when read together an intention on the part of the Legislature to authorize the court to direct the child's activity while in the hospital or to decide when he is eligible for release from the hospital. The court may attach conditions to the order of commitment under Section 211.201, supra, and may, from time to time, require information concerning the child under Section 211.231, supra, so long as the child is under its jurisdiction, but as far as release on convalescent status and ultimate discharge from the institution is concerned, that would seem to be a matter to be determined by the head of the hospital.

If a child is discharged from a hospital within the Division of Mental Diseases within the period during which the juvenile court has retained jurisdiction of the child, it should be upon proper communication with the committing court and the return of the child to the court for such further disposition of the child as the court may deem advisable.

CONCLUSION

It is the opinion of this office that in the order of the juvenile court committing a child to a hospital within the Division of Mental Diseases the court may retain jurisdiction of the child until the age of twenty-one, but it is not necessary that it do so. Whether the court retains jurisdiction or not, the head of the hospital may release the child on convalescent status and ultimately discharge such child from the hospital. If a child is discharged from a state mental hospital within the period during which the juvenile court has retained jurisdiction, the court should be notified and the child returned to the court for such further disposition of the child as the court may deem advisable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

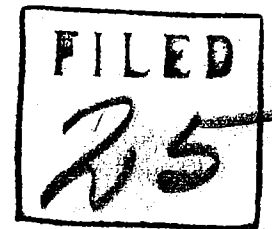
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STATE HOSPITALS: (I) Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the estate and guardian of the person. (II) Consent of the guardian, whether the guardianship be one of the person or of the estate, is not required prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, RSMo Cum. Supp. 1957, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, RSMo Cum. Supp. 1957, are applicable. In all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation.

July 9, 1959

Honorable Addison M. Duval, M.D.
Director, Division of Mental Diseases
Jefferson City, Missouri

Re: File LB



Dear Dr. Duval:

This is in response to your request for an opinion dated June 3, 1959, which reads as follows:

"On occasions we have discussed with the Superintendents of our hospitals the question of their legal responsibility for patients. The question of what does the term "Legal Guardian" actually imply arises.

"My own experience in the past has given me the impression that guardianship is of two types--one concerning itself with the estate of an incompetent person, and the other specifically for the person. It has been my impression for some years that usually when the Court appoints a legal guardian that is to protect the estate of the incompetent person.

"We recently had an incident in which permission for an autopsy was obtained from a parent of a patient who died, but we did not get consent from the legal guardian, who became somewhat irate over the incident. On a review of the Missouri Autopsy Law we find no mention of the role of legal guardian in the priority list of individuals from whom to obtain these autopsy permits. This problem becomes somewhat complicated, particularly when an institution, such as a bank, is the guardian. If there is a responsible next of kin it would seem that operative,

Honorable Addison M. Duval, M. D.

as well as autopsy permits, should be obtained from the next of kin rather than from a guardian who is not a blood relative.

"Currently, we have decided to obtain autopsy and operative permits from both guardian and next of kin, but we would appreciate legal clarification of this particular point.

"I feel that a definite opinion in this area would be very helpful to the administrators of all the institutions in this Division."

For purposes of clarity, we have chosen to treat the issues raised in your request as two separate and distinct questions and have handled each question separately and independently.

I.

Do the statutes of Missouri provide for two types of guardian, namely, guardian of the person and guardian of the estate?

Chapter 475, RSMo Cum. Supp. 1957, relates to guardianship in the State of Missouri. The sections of Chapter 475 which are pertinent to the question at hand read as follows:

"Section 475.010. When used in sections 475.010 to 475.370, unless otherwise apparent from the context:

"(1) A 'guardian' is one appointed by a court to have the care and custody of the person or of the estate, or of both, of a minor or of an incompetent;

"(2) A 'guardian ad litem' is one appointed by a court, in which particular litigation is pending, to represent a minor or incompetent or an unborn person in that particular litigation;

"(3) An 'incompetent' is any person who is incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both;

"(4) A 'minor' is any person who is under the age of twenty-one years;

Honorable Addison N. Duval, M.D.

"(5) A 'ward' is a minor or incompetent for whom a guardian has been appointed."

"Section 475.030. 1. Letters of guardianship of the person or estate, or both, may be granted for any person adjudged incompetent,

"2. Letters of guardianship of the estate of a minor shall be granted for that part of the estate of the minor which is not derived from a living parent who is acting as natural guardian.

"3. Letters of guardianship for the estate of a minor may be granted in the following cases:

"(1) Where the minor has no parent living; or

"(2) Where there is a natural guardian of the minor and where the court finds that the best interests of the minor require letters of guardianship for all of his estate.

"4. Letters of guardianship of the person of a minor may be granted in the following cases:

"(1) Where a minor has no parent living;

"(2) Where the parents or the sole surviving parent of a minor are adjudged unsuitable or incompetent for the duties of guardianship;

"(3) Where the father of a minor is imprisoned in the penitentiary of this state.

"5. No guardian of the person shall be appointed for any married minor."

"Section 475.045. 1. Except in cases where they fail or refuse to give security or are adjudged unfit or incompetent for the duties of guardianship, or waive their rights to be appointed, the following persons, if otherwise qualified, shall be appointed as guardians of minors:

"(1) The parent or parents of a minor as his guardian;

"(2) If any minor over the age of fourteen years has no

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qualified parent living, any person selected by the minor as his guardian;

"(3) Where both parents of a minor are dead, any person appointed by the will of the last surviving parent, who has not been adjudged unfit or incompetent for the duties of guardian, as guardian of his minor child.

"2. Incompetency or unfitness of any of the persons mentioned in subsection 1 for the duties of guardianship may be adjudged by the court after due notice and hearing.

"3. If no appointment is made under subsection 1, the court shall appoint as guardian of a minor the most suitable person who is willing to serve but a minor shall not be committed to the guardianship of a person of religious persuasion different from that of the parents, or of the surviving parent of the minor, if another suitable person can be procured, unless the minor, being of the age of fourteen years shall so request."

"Section 475.050. The spouse of a person adjudged incompetent may be appointed guardian of the person or of the estate, or of both, of the incompetent."

"Section 475.055. 1. Except as herein otherwise provided:

"(1) Any natural person of full age may be appointed guardian of the person or of the estate or of both of a minor or incompetent, except that a parent shall not be denied appointment as guardian of the person of a minor for the reason that the parent is a minor;

"(2) Any charitable organization, incorporated under the laws of this state, which has custody of the person of a minor or incompetent and which has power under its charter to so act, may be appointed guardian of the person or of the estate or of both of such minor or incompetent.

"(3) Any corporation authorized to do business in this state and empowered by its charter to so act or any national banking association authorized to so act in this state may be appointed guardian of the estate.

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"2. No judge of the probate court or sheriff or clerk of the probate court or deputy of either in his own county, no person under twenty-one years of age, other than as provided in subsection 1, or of unsound mind, no habitual drunkard or narcotic addict and, except as otherwise provided by law, no person who is a non-resident of this state, shall be appointed guardian of the person or of the estate. No person whose letters of guardianship are revoked for failure to make settlement, shall be appointed guardian within two years after the revocation. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person."

"Section 475.090. If it appears to the court that a guardian should be appointed for a minor or if it is found by the jury or the court that the subject of an inquiry is incompetent as defined in this law, the court shall appoint a guardian of the person and estate of the minor or incompetent, or if the court finds that it will be to the advantage of the minor or incompetent to appoint a guardian of the estate, different from the guardian of the person, the court shall make such appointment. The appointment of guardians of minors shall be made in accordance with Section 475.045, except that if a person entitled to appointment as a guardian or entitled to select a guardian fails to appear after notice or to apply for such appointment or make selection in accordance with the order of the court the court may appoint any suitable person as guardian."

Section 475.010(1), supra, in defining the word "guardian" states that as used in the statutes it means a person appointed by the probate court to have the care and custody of the person, care and custody of the estate, or both. Section 475.030, supra, provides that letters of guardianship of the person or estate, or both may be granted when certain circumstances exist and then the circumstances are listed.

Sections 475.045 and 475.050, supra, specify who may be appointed guardian of minors and incompetents, and Section 475.090, supra, provides that if the court finds that it will be to the advantage of the minor or incompetent it may appoint one person

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guardian of the person and another person guardian of the estate.

Therefore, it must be concluded that Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the person and guardian of the estate. It is possible to have either one or both types of guardians in a given case, depending upon the circumstances. Furthermore, it is possible for one person to be appointed guardian of the person and another person to be appointed guardian of the estate, or the same person may be both. In order to determine the nature of the guardianship, one would have to refer to the letters of guardianship issued by the probate court.

II.

Is consent of the guardian required prior to performing an autopsy or a surgical operation?

Section 194.115, RSMo Cum. Supp. 1957, provides that it shall be unlawful for a physician, and surgeon to perform an autopsy without the consent of one of the persons named in the act. Nowhere in that section is it indicated that the consent of the guardian is ever required except where subparagraph 5 of numbered paragraph 1 is applicable. Furthermore, Section 475.285, RSMo Cum. Supp. 1957, specifies when the authority of the guardian terminates and subparagraph 6 of numbered paragraph 1 provides that the guardianship terminates upon the death of the ward except that if there is no person other than the estate of the ward liable for the funeral and burial expenses of the ward, the guardian may with the approval of the court contract for the funeral and burial of the ward.

In view of the foregoing, it is the opinion of this office that the consent of the guardian, whether the guardianship be one of the person or one of the estate, need not be obtained prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, supra, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, supra, are applicable.

We have been unable to find a statute that requires the consent of a patient to a surgical operation. However, it is well-settled law that a physician or surgeon who performs an operation without the consent, express or implied, of his patient or someone legally authorized to consent for him is liable for damages. 70 C.J.S. Section 48, page 967.

You inquire as to whether the consent of the guardian is required before a surgical operation is performed on the ward.

Honorable Addison M. Duval, M. D.

You point out in the request that in those cases where an institution, such as a bank, is guardian, it would be quite complicated if it is necessary to obtain the operative permit from the guardian. You further state that it would seem that the consent of the next of kin, who is a blood relative, rather than the guardian should be obtained.

Section 475.130, RSMo Cum. Supp. 1957, outlines the general powers of the guardian of the estate and reads as follows:

"1. The guardian of the estate of a minor or incompetent shall, under supervision of the court, protect and preserve the estate, invest it prudently, apply it as provided in this code, account for it faithfully, perform all other duties required of him by law, and at the termination of the guardianship deliver the assets of the ward to the persons entitled thereto.

"2. The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issue and profits therefrom, whether accruing before or after his appointment, and of the proceeds arising from the sale, mortgage, lease or exchange thereof. Subject to such possession, the title to all such estate, and to the increment and proceeds thereof, is in the ward and not in the guardian.

"3. The guardian of the estate shall prosecute and defend all actions instituted in behalf of or against his ward; collect all debts due or becoming due to his ward, and give acquittances and discharges therefor, and adjust, settle and pay all claims due or becoming due from his ward, upon such terms as may be prescribed by the probate court so far as his estate and effects will extend."

As the duties and powers of the guardian of the estate as enumerated in the above cited section concern and deal with only the estate of a minor or incompetent, we are of the opinion that the consent of the guardian of the estate is not required before performing a surgical operation.

Honorable Addison M. Duval, M. D.

With respect to your comment regarding the complications when a bank is guardian we direct your attention to Section 475.055, RSMo Cum. Supp. 1957, which sets out the qualifications for guardians and reads as follows:

"1. Except as herein otherwise provided:

"(1) Any natural person of full age may be appointed guardian of the person or of the estate or of both of a minor or incompetent, except that a parent shall not be denied appointment as guardian of the person of a minor for the reason that the parent is a minor;

(2) Any charitable organization, incorporated under the laws of this state, which has custody of the person of a minor or incompetent and which has power under its charter to so act, may be appointed guardian of the person or of the estate or of both of such minor or incompetent.

"(3) Any corporation authorized to do business in this state and empowered by its charter to so act or any national banking association authorized to so act in this state may be appointed guardian of the estate.

"2. No judge of the probate court or sheriff or clerk of the probate court or deputy of either in his own county, no person under twenty-one years of age, other than as provided in subsection 1, or of unsound mind, no habitual drunkard or narcotic addict and, except as otherwise provided by law, no person who is a nonresident of this state, shall be appointed guardian of the person or of the estate. No person whose letters of guardianship are revoked for failure to make settlement, shall be appointed guardian within two years after the revocation. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person."

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Numbered paragraph 2 of the section quoted hereinabove provides that the guardian of the person must be a natural person except for the exception contained in subparagraph 2 of numbered paragraph 1, that exception being charitable organizations which have been incorporated under the laws of Missouri and who have power under their charter to act as guardian of the person. Subparagraph 3 of numbered paragraph 1 of the above section permits a corporation, which includes banks, to act as guardian of the estate but not as guardian of the person. Therefore, as consent of the guardian of the estate is not required for surgical operations, and as banks may act only as guardians of the estate, the complication suggested in your request should not arise except in a few isolated instances where a charitable institution has been appointed guardian of the person.

Section 475.120, RSMo Cum. Supp. 1957, outlines the powers and duties of the guardian of the person and provides as follows:

"1. The guardian of the person of a minor is entitled to the custody and control of his ward and to the care of his education, support and maintenance.

"2. The guardian of the person of an incompetent shall take charge of the person of his ward and provide for his support and maintenance as required by this code. If the court finds that an incompetent ward is so far disordered in his mind as to endanger his own person or the persons or property of others, it may make an order for his restraint and safekeeping. The guardian shall confine any such ward in a suitable place for a reasonable time and until the court may make such order."

As the above cited section gives the guardian of the person full charge of the ward, we are of the opinion that in all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation on the ward.

It is to be noted that as your inquiry related only as to if and when the consent of the guardian is required, this opinion

Honorable Addison M. Duval, M. D.

has been limited to that proposition. However, it is not to be inferred from this opinion that where an incompetent has a guardian of the person that the consent of the guardian is all the consent that is required. It is our view that in those cases where there is a guardian of the person, you should continue, as you have been doing, to obtain the consent of the next of kin in addition to the consent of the guardian. In those cases where the patient is capable of giving his consent, you should also obtain that consent in addition to the consent mentioned hereinabove.

CONCLUSION

Therefore, it is the opinion of this department that:

I.

Missouri, by statute, provides for two separate and distinct types of guardianship, namely, guardian of the estate and guardian of the person.

II.

Consent of the guardian, whether the guardianship be one of the person or of the estate, is not required prior to performing an autopsy except in those few cases where subparagraph 5 of numbered paragraph 1 of Section 194.115, RSMo Cum. Supp. 1957, and the exception in subparagraph 6 of numbered paragraph 1 of Section 475.285, RSMo Cum. Supp. 1957, are applicable. In all cases where the patient has a guardian of the person, the consent of the guardian should be obtained before performing a surgical operation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Calvin K. Hamilton.

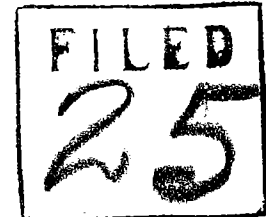
Very truly yours,

John M. Dalton
Attorney General

CKH:law:gm

MENTAL HEALTH: The venue of proceedings instituted under the provisions of Section 202.807, RSMo Cum. Supp. 1957,
STATE HOSPITAL: relating to the involuntary hospitalization by judicial proceedings brought for the purpose of retaining
PROBATE COURT: in a state hospital for care and treatment a prisoner whose term has expired all as contemplated by House Bill 261, adopted by the 70th General Assembly, is properly in the probate court of the county of the patient's residence. A state hospital would not be liable for costs of court commitment of those patient's contemplated by H.B. 261 who are carried on the hospital rolls as "state support" and who have no residence in the state of Missouri.

July 27, 1959



Dr. Addison M. Duval
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Doctor Duval:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"It is my understanding that our Governor has signed House Bill No. 261 which was passed by the Seventieth General Assembly. This will, of course, then become law on August 29.

"This law will have the effect of requiring the Superintendent of the Fulton State Hospital to process the commitment of some seventy patients whose sentence will automatically expire at the time the bill becomes effective. Needless to say, the administration of that hospital will be faced with many problems in handling this situation.

"The following questions are posed for your interpretation and ruling:

1. What county has jurisdiction in the commitment of these cases we have here who were transferred from the Missouri State Prison, and whose sentences will expire when this law becomes effective, as well as future cases? Does the original county of residence have jurisdiction, or would the local county in which the hospital is located have jurisdiction?

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2. If the local county would have jurisdiction, would it be possible to assign the costs of court commitment to the counties of residence of these patients?

3. In those cases who have no residence in any Missouri county, and who are currently carried on our rolls as 'state support' would the hospital have to bear the costs of court commitment, or would the costs properly be assigned to Callaway County?"

The pertinent portion of House Bill No. 261, adopted by the Seventieth General Assembly to which you refer is Section 549.051, paragraph 3.

"When the term of a prisoner who has been committed or transferred to a state mental hospital has expired and the person, in the opinion of the hospital superintendent is still mentally ill and for the welfare and safety of himself and others should remain in the hospital for custody, care and treatment, he shall be retained in the hospital only after proper proceedings have been instituted and held as provided by section 202.807, RSMo, for hospitalization by judicial procedure; except that he may be retained for not more than thirty days after the expiration of his sentence for the purpose of initiating such proceedings."

Under this provision a prisoner whose term has expired may be retained in the hospital only after proper proceedings have been instituted and held as provided by Section 202.807, RSMo Cum. Supp. 1957, for hospitalization by judicial procedure.

Suffice it to say that House Bill No. 261 does not undertake to establish the venue of proceedings contemplated by said Bill. Therefore, we must look to the provisions of Chapter 202, RSMo Cum. Supp. 1957.

Section 202.807, RSMo Cum. Supp. 1957, referred to in House Bill No. 261, outlines the procedure for the involuntary hospitalization of an individual after judicial proceedings in the probate

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court and upon court order. Since said section does not specifically establish the venue of such proceedings, we do not deem it necessary to set out herein said section.

Your attention is invited to Section 202.805, RSMo Cum. Supp. 1957, which reads:

"1. Within ten days after the admission of any person under the provisions of section 202.800 or 202.803 the head of the hospital shall notify the probate court of the county of residence of such patient. Such notification shall contain the full name of the patient, his address, manner of admission, the name of his next of kin, spouse or guardian, and such other information concerning the patient as may be necessary.

"2. Upon receipt of the notice the judge shall note it on his docket and if no proceeding is instituted under section 202.807 by any person authorized to do so within five days, he shall order the patient's release. The head of the hospital upon receipt of the order of release shall release the patient immediately.

"3. If the proceeding under section 202.807 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 202.807 be performed before the hearing. The court may order the temporary confinement continued until the rendition of judgment in the proceeding, but the judgment shall be rendered not later than five days after the end of the hearing."

We note here that under the procedure for emergency hospitalization (Sections 202.800 - 202.803), notice is to be given to the probate court "of the county of residence of such patient" and that upon receipt of such notice, and upon proper application, proceedings shall be commenced under the provisions of Section 202.807. This would indicate to us that the proper

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venue of proceedings commenced under Section 202.807 is in the probate court of the county of the patient's residence. This conclusion would seem to accord with the context of Chapter 202. We see nothing that would indicate that the venue would be other than the county of the patient's residence in cases contemplated by House Bill No. 261, adopted by the Seventieth General Assembly.

Having concluded that the proper venue is in the county of the patient's residence in proceedings authorized by House Bill No. 261 and Section 202.807, RSMo Cum. Supp. 1957, we need not answer your second question since it is predicated upon an assumption that venue would be in the probate court of the county where the hospital was located.

Lastly you inquire whether the state hospital would have to bear the "costs" of court commitment of those patients (coming within the purview of House Bill No. 261) who are carried on the hospital rolls as "state support" and who have no legal residence in the state of Missouri.

It is a familiar rule that "costs" of judicial proceedings do not have their origin in the common law but are purely creatures of statute and such statutes must be strictly construed. It is also a familiar rule that a sovereign state in actions to which it is a party in its own courts is not liable for costs in the absence of an express statute creating such a liability. See 14 Am. Jur. Costs Section 34, page 22.

We have not been able to find any statute which would impose upon the State or one of its mental institutions the liability for costs under the circumstances and in a proceeding such as you have indicated.

In the absence of any statutory provision we conclude in answer to question 3 that the hospital would not be liable for costs of such a proceeding. We do not deem it necessary at this writing to express our opinion as to the liability of the county in which the hospital is located for costs in such a proceeding since such matter does not concern the duties of your office.

CONCLUSION

Therefore it is the opinion of this office that the venue of proceedings instituted under the provisions of Section 202.807, RSMo Cum. Supp. 1957, relating to the involuntary hospitalization

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by judicial proceedings brought for the purpose of retaining in a state hospital for care and treatment a prisoner whose term has expired all as contemplated by House Bill No. 261, adopted by the Seventieth General Assembly, is properly in the probate court of the county of the patient's residence.

It is the further opinion of this office that a state hospital would not be liable for costs of court commitment of those patients contemplated by House Bill No. 261 who are carried on the hospital rolls as "state support" and who have no residence in the state of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

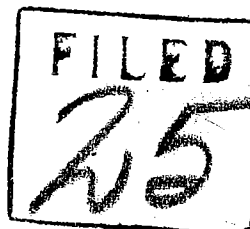
Very truly yours,

John M. Dalton
Attorney General

DDG:gm

STATE HOSPITALS: Section 202.863, RSMo, Cum. Supp. 1957, is applicable when a patient is committed to a
COUNTY PATIENTS: state hospital by order of a probate court under the mental illness act. It is not within
PROBATE COURTS: the province of a probate court when said court orders a person committed to a state hospital, under the mental illness act, to determine whether such person is to be admitted as a county patient.

August 12, 1959



Addison M. Duval, M. D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"From time to time there are questions raised by administrators of our state hospitals relative to the interpretation of laws and we want to screen those and should we feel they do warrant your attention, they will be forwarded for your study.

"We have recently had a communication from the St. Joseph State Hospital having to do with the interpretation of the intent of the Law with respect to private and county patients in the state hospitals. The County and Probate Courts of Buchanan County evidently are in disagreement with the state hospital in their efforts to comply with the law as they interpret it.

"To more clearly give you the picture, the following is an excerpt taken from a letter sent to me by Dr. Mullinax, Superintendent of the St. Joseph State Hospital.

'For instance, we are notifying the county courts that certain patients have Social Security benefits payable and are asking the county court to take these people off their county rolls and we will use the Social Security benefits to pay for their care in our hospital. Buchanan County Court

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does not agree as the other county courts do, and they will not allow us to do this. They state that only the Probate Court has the power to say whether or not a patient is to be a county or a pay patient. We feel that this is in variance with our Commitment Law 202.863 Section 3, which reads as follows: If any person is admitted to a state hospital who is unable to pay for care and treatment, the superintendent of the hospital shall notify the county court of the county of residence of the fact and the county court shall hold a hearing on the case within ten days following the notification. If it is determined at the hearing that the person is unable to pay for care and treatment, the county court shall order the hospitalization of the person as a county patient. Appeals from the decision of the county court may be taken in the manner provided in sections 49.230 to 49.250, RSMo.

I am enclosing a letter from Frederick J. Culver, Presiding Judge of Buchanan County, dated May 13, 1959. This letter does not cover all of the points which we have discussed however. Specifically, an opinion is requested for each of the following questions:

1. Does this statute apply when a patient is committed by the Probate Court?
2. Does this statute apply when the Probate Court orders a patient committed as a County patient?
3. When a patient is committed to a state hospital as a County patient by order of the Probate Court, does subsection 3 of section 202.863 require the superintendent of the hospital to notify the County Court that the patient is unable to pay?

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4. Does a Probate Court commitment which specifies that a patient is to be received as a County patient leave the County Court without duty, responsibility, or authority to hold the hearing as provided in subsection 3 of section 202.863?

5. Does a Probate Court commitment which specifies that a patient is to be received as a private patient leave the County Court without duty, responsibility, or authority to hold the hearing as provided in subsection 3 of section 202.863, when the patient on admittance declares he is unable to pay for his care and treatment?

6. If a patient who can pay and who has reached an agreement with the superintendent as to the amount he will pay is later committed by the Probate Court as a County patient, must he be received as a County patient?

7. If the answer to question 6, above, is in the negative, what action should the superintendent take and under what authority does he take such action?

'As soon as we advise the Buchanan County Court that we have a county patient who is profiting from Social Security benefits, the Buchanan County Probate Court immediately appoints a guardian to care for these payments. The other counties have allowed the State Hospital or relatives of the patient to accept these checks and pay for their care at State Hospital. We do not have any objection to the Probate Court appointing a guardian, but our understanding with the Social Security office was that it is not necessary to have a guardian appointed, and they are willing to turn the money paid by Social Security over to the Business Manager of the State Hospital in order

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that the patient will receive the most benefit in the use of his Social Security check.'

"While the foregoing seems to be a local problem, I do believe that a proper interpretation of the intent of the law would help our hospital administrators, should similar situations arise in their particular areas."

It is evident from your letter that you are referring only to persons committed by probate courts under the mental illness act (Section 202.780 through 202.870, MoRS, Cum. Supp. 1957), and it is only to such persons that this opinion will refer. The specific questions which you ask are found upon pages 2 and 3 and are numbered 1 through 7. It is to these questions that we will direct our attention.

Your first question is whether "this statute", by which you certainly refer to Section 202.863, RSMo, Cum. Supp. 1957, applies when a patient is committed by the probate court. We believe that the answer to this question is most definitely in the affirmative.

Your remaining questions are all predicated upon the fact of the probate court ordering a patient committed as a county patient. We do not believe that the probate court has any authority, under the mental illness act, to order a patient committed as a county patient and that, therefore, your questions 2 through 7 are all resolved by this fact, to wit, that the assumption upon which they are predicated is not valid.

Our reason for taking this position will be set forth by us as follows:

Section 202.807, RSMo, Cum. Supp. 1957, sets forth in elaborate detail the proceedings for the involuntary hospitalization of an individual. This section provides for the filing of an application for such hospitalization in the probate court; the giving of a notice by the court of the receipt of such an application to certain persons including the proposed patient. The section goes on to provide for a hearing and the manner in which such hearing shall be held. Numbered paragraph 5 of such section sets forth what may be encompassed in the finding of the probate court upon the completion of such a hearing. Said paragraph reads:

"5. If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient is mentally ill,

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and is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization, it shall order his hospitalization for an indeterminate period or for temporary observational period not exceeding six months; otherwise it shall dismiss the proceedings. If the order is for a temporary period the court at any time prior to the expiration of such period, on the basis of report by the head of the hospital and such further inquiry as it may deem appropriate, may order indeterminate hospitalization of the patient or dismissal of the proceedings. The order of hospitalization shall state whether the individual shall be detained for an indeterminate or for a temporary period and if for a temporary period, then for how long."

It will be noted that there is nothing in the above paragraph which would authorize the probate judge to enter an order as to whether or not the individual would be hospitalized, assuming that hospitalization was a portion of the court's order, as a county patient.

It will also be noted that there is nothing in the aforesaid section which requires the probate court to inquire into the matter of whether the proposed patient is financially able to pay his own way. Without a rather detailed inquiry into the financial condition of a proposed patient, it would be impossible for a probate judge to reach a decision as to whether or not the patient should be admitted as a county patient. Numbered paragraph 3 of Section 202.807, supra, sets forth the scope of the inquiry in the probate court. That section reads:

"3. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court in its discretion may receive the testimony of any other person. The proposed patient shall not be required to be present. At least one of the witnesses at the hearing shall be

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a licensed and reputable physician who has examined the individual within twenty days prior to the hearing. If an order of hospitalization is made, such medical witness shall make out a detailed history of the case, as far as practicable, stating the diagnosis or nature of the mental illness, its duration, former treatment of the patient, and all other particulars relating to the patient and his disease on forms acceptable to the division of mental diseases. Such history shall be attached to the order of hospitalization to be delivered to the hospital. The court in its discretion may order further examination as to the mental condition of the proposed patient and may continue the hearing until the report of such further examination is made to the court."

From the above it would appear to us that nowhere is the probate court given the authority to commit as a county patient. On the contrary, we believe it to be amply plain that this determination is to be made by the county court. Numbered paragraph 3 of Section 202.863, RSMo, Cum. Supp. 1957, reads:

"3. If any person is admitted to a state hospital who is unable to pay for care and treatment, the superintendent of the hospital shall notify the county court of the county of residence of the fact and the county court shall hold a hearing on the case within ten days following the notification. If it is determined at the hearing that the person is unable to pay for care and treatment the county court shall order the hospitalization of the person as a county patient. Appeals from the decision of the county court may be taken in the manner provided in sections 49.230 to 49.250, RSMo."

There is, of course, provision made for the voluntary hospitalization of individuals (Section 202.783); hospitalization on medical certification (Section 202.797); and emergency hospitalization (Section 202.800).

We also note Section 202.220, RSMo 1949, which reads:

"If the probate court of the proper county shall so order, the clerk thereof

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shall transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him therein. Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided by this chapter in the cases of poor patients."

We also note Section 202.240, RSMo 1949, which reads:

"If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this chapter in case of poor persons."

From the above it would appear that in those instances where persons have been committed under the mental illness act the initial determination as to whether they are to be county patients is to be made by the county court (except when the person has been committed from St. Louis City), but that subsequent determinations as to whether such persons shall be pay or county patients are to be made by the probate court under the provisions of Sections 202.220 and 202.240, supra.

We also note Section 202.813, MoRS, Cum. Supp. 1957, numbered paragraph 1 of which reads:

"1. Whenever an individual is about to be hospitalized under the provisions of sections 202.797, 202.800, 202.803 or 202.807, the county court or the probate

Addison M. Duval, M. D.

court if the individual is a resident of the city of St. Louis or a class one county, upon the request of a person having a proper interest in the individual's hospitalization, and if the court finds that the individual is entitled to be hospitalized as a county patient, or that such action is necessary for the individual's physical and mental health, shall arrange for the individual's transportation to the hospital with suitable medical or nursing attendants and by such means as may be suitable for his medical condition. Whenever practicable, the individual to be hospitalized shall be accompanied by one or more of his friends or relatives."

We do not believe that this section, although it may perhaps appear to do so, gives the probate court of a class one county the power of initial determination as to whether a person committed is to be a county patient, but rather that such section merely authorizes the payment of the cost of the individual's transportation to the hospital with suitable medical or nursing attendants and is not authority for holding that the probate court in counties of class one determines what patients are to be county patients for any purpose except transportation. Such a holding would be in conflict with the provisions of Section 202.863, supra.

CONCLUSION

It is the opinion of this department that Section 202.863, RSMo, Cum. Supp. 1957, is applicable when a patient is committed to a state hospital by order of a probate court under the mental illness act. It is the further opinion of this department that it is not within the province of a probate court, when said court orders a person committed to a state hospital, under the mental illness act, to determine whether such person is to be admitted as a county patient.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

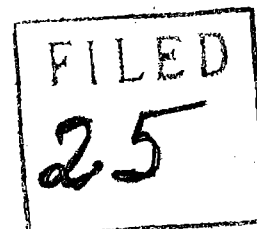
Yours very truly,

JOHN M. DALTON
Attorney General

DIVISION OF MENTAL DISEASES: It is the opinion of this department
PATIENT MAINTENANCE IN: that the Division of Mental Diseases
BOARDING, NURSING, OR: may only appropriate for the care of
FAMILY HOMES: a patient in a boarding, nursing or
a family home an amount not to exceed
the average per capita cost of maintenance for the prior fiscal year
of patients in the state hospital from which such person was trans-
ferred, but that the family of such a patient, or any friend or
interested party, may contribute out of private resources an addi-
tional sum for such care which contribution would make the total
amount paid to such home more than the average per capita cost of
maintenance of such patient for the prior fiscal year in the state
hospital from which he was transferred.

October 9, 1959

Honorable Addison M. Duval, M. D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Dr. Duval:

Your recent request for an official opinion reads:

"I am writing to request an interpretation of
Senate Bill No. 18 and specifically Section 202.831.

The question has been raised as to whether the
total payment for care of a mental hospital patient
in a boarding, licensed nursing home or family
home can be agreed to by the hospital if this
cost is more than the average per capita cost of
maintenance for the prior fiscal year of patients
in the state hospital from which the patient is
to be transferred.

In some instances, the families of private
patients are willing to pay more than the per
diem hospital patient cost for the prior fiscal
year. In other instances families of private
patients can pay a part of the nursing home cost
and are asking the Division of Mental Diseases
to contribute specially appropriated funds for
this purpose in a sum which would result in the
nursing home or other home operator receiving
more money for the care of the patient than that
represented by the per capita patient cost in
the state hospital for the prior fiscal year."

Number 1 of Section 202.831 of Senate Bill No. 18 enacted
by the 70th General Assembly of Missouri reads:

"(1) The head of a state mental hospital may
place any patient, except those committed as
criminally insane, in a suitable boarding,
licensed nursing home or family home other

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than his own home or that of any person related to him within the fourth degree, by consanguinity or affinity upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. If the patient so placed is ineligible to receive public assistance benefits from the Division of Welfare, or such benefits are inadequate to meet the costs of such care, the monthly costs may be paid or supplemented out of funds appropriated for that purpose to the Division of Mental Diseases; provided, however, that payment for such care shall not exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state hospital from which he is transferred."

That portion of the above excerpt from Senate Bill No. 18 with which we are here particularly concerned is the provision that payment for the care for which the act provides "shall not exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state hospital" from which the patient was transferred.

It seems clear to us that the payment referred to is out of funds appropriated for that purpose to the Division of Mental Diseases and that payment for maintenance out of this fund shall not exceed the average per capita cost of maintenance in the prior fiscal year, of patients in the state hospital from which the patient was transferred to a boarding, nursing, or family home.

From your letter we deduce that the situation which you contemplate is one in which the family of a patient, in order to secure better care for such patient, out of their own resources, makes an independent payment to a boarding, nursing or private home for the care of such patient in addition to the amount paid by the Division of Mental Diseases. Let us for purposes of illustration, hypothecate a situation: John Doe has been a patient at the state hospital No. 1 in Fulton; the superintendent of that hospital desires to place Doe in one of the homes designated in paragraph (1), Section 202.831; the average per capita cost of maintenance for the prior fiscal year in state hospital No. 1 was, let us assume, \$60 per month; the particular home which the superintendent has in mind charges \$100 per month for maintaining patients. We believe that the Division

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of Mental Diseases may pay to such a home the sum of \$60 per month and no more, but that the family of Doe may, out of its own resources, pay to the home an additional \$40 per month.

CONCLUSION

It is the opinion of this department that the Division of Mental Diseases may only appropriate for the care of a patient in a boarding, nursing or a family home an amount not to exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state hospital from which such person was transferred, but that the family of such a patient, or any friend or interested party, may contribute out of private resources an additional sum for such care which contribution would make the total amount paid to such home more than the average per capita cost of maintenance of such patient for the prior fiscal year in the state hospital from which he was transferred.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

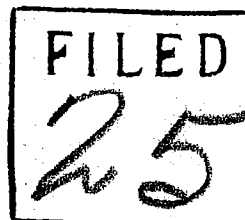
Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar

INMATES OF STATE INSTITUTIONS: The superintendent of a state hospital may open sealed personal mail addressed to private or committed patient; COMMUNICATION: and he may refuse to mail letters or packages from voluntary or committed patients which contain obscene matter or threats of violence to others, but he may not interfere with a communication by a patient to the court which committed him, or to the Division of Mental Diseases.

October 9, 1959



Honorable Addison M. Duval, M.D.
Director
Division of Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Dr. Duval:

Your recent request for an official opinion reads:

"It has come to my attention that the Superintendents of the several state mental hospitals and the state school and hospitals have established different methods of handling outgoing and incoming U. S. Mail addressed by and to the patients in these institutions.

"For outgoing mail of both voluntary and committed patients, it is the general practice for this mail to be read and censored as to mailability (obscenity, threats and the like) by an official of the hospital who then either completes the mailing or returns the material to the writer with an explanation.

"With regard to the receipt of mail for both voluntary and committed patients, procedures differ in the several institutions. In some instances, all incoming mail is opened by an employee on orders of the Superintendent and then usually is handed to the patient. In other instances letters are handed to the patient unopened while packages are opened and inspected by an employee in the presence of the patient.

"It is the general practice in the best mental hospitals in other states not to interfere any more than considered absolutely necessary with the mail of mental hospital patients. There most mail is delivered to the patients unopened.

Honorable Addison N. Duval, M.D.

If suspicious packages are received, these are then opened by the patient in the presence of an employee. As the Director of the Division, I would prefer this type of practice which I consider more humane.

"I would appreciate an opinion from you as to whether the Superintendents of the state institutions have authority to (1) open sealed personal mail to private patients or committed patients, and (2) whether the Superintendents have authority to refuse to mail letters or packages from voluntary or committed patients which contain obscene matter or threats of violence to others."

Section 202.847, Mo.R.S. Cum. Supp. 1957, reads:

"1. Subject to the general rules and regulations of the hospital and except to the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose restrictions, every patient shall be entitled:

(1) To communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital;

(2) To receive visitors; and

(3) To exercise all civil rights, including the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote, unless he has been adjudicated incompetent and has not been restored to legal capacity.

"2. Notwithstanding any limitations authorized under this section on the right of communication, every patient shall be entitled to communicate by sealed mail with the division and with

Honorable Addison M. Duval, M.D.

the court, if any, which ordered his hospitalization.

"3. Any limitations imposed by the head of the hospital on the exercise of these rights by the patient and the reasons for such limitations shall be made a part of the clinical record of the patient."

You ask two questions, the second of which is whether superintendents of state hospitals have authority to refuse to mail letters or packages from voluntary or committed patients which contain obscene matter or threats of violence to others.

Under the authority vested in the superintendent under Section 202.847, supra, I do not believe that there can be any question but that the superintendents may refuse to mail such material. In the situation which you set forth, there is, of course, no question regarding the United States mail because a letter which has not been mailed has not entered the "bloodstream" of the mail and so does not involve any question relating to that matter.

Your first question is whether the superintendents of state hospitals have authority to open sealed, personal mail to both voluntary patients and committed patients.

While the situation here is somewhat different than that presented in your second question, we believe it to be clear that Section 202.847 does give the superintendent the right to open sealed, personal mail.

From numbered paragraph 2 of Section 202.847, it would appear that a patient would have the right of communication, including communication by mail "with the division and with the court, if any, which ordered his hospitalization." It would also appear that this would be mail which the superintendent could not open or stop in passage.

We may say that we have made a search of the federal law pertaining to the United States mail and have not found anything contrary to the holdings above. We do direct attention to the following portion of the Postal Manual Promulgated by the Postmaster-General of the United States:

Honorable Addison M. Duval, M.D.

"Part 154

"Conditions of Delivery

"154.2 Delivery of Addressee's Mail to Another

.22 Delivery of Mail to Minors. A minor's guardian may control delivery of mail addressed to the minor. If there is no guardian, and the minor is unmarried, then the father or, if he is dead, the mother may receive delivery of the minor's mail.

.23 Delivery of Mail to Incompetents. Where a person has been legally declared an incompetent, his mail may be delivered in accordance with the order of his guardian or conservator. Where there is no legal representative, the mail is delivered as addressed.

"154.6 Delivery of Mail Addressed to Persons at Firms, Hotels, Institutions, Schools, etc.

.61 Mail addressed to patients or inmates at institutions, unless otherwise directed by the addressee, is delivered to the institution authorities who in turn will deliver the mail to the addressee in accordance with the institution's rules and regulations."

CONCLUSION

It is the opinion of this department that the superintendent of a state hospital may open sealed, personal mail addressed to private or committed patients and that he may refuse to mail letters or packages from voluntary or committed patients which contain obscene matter or threats of violence to others, but that he may not interfere with a communication by a patient to the court which committed him, or to the Division of Mental Diseases.

Honorable Addison M. Duval, M.D.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

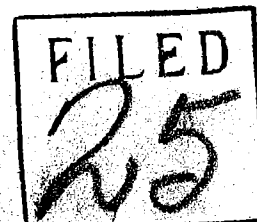
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INTERSTATE MENTAL HEALTH COMPACT:
(HOUSE BILL NO. 47 ENACTED BY
THE 70th GENERAL ASSEMBLY):

The Missouri Compact Administrator of the Interstate Mental Health Compact is not given any authority under Article III (a) of House Bill No. 47 enacted by the 70th General Assembly. The Compact administrator in Missouri is not given the authority to authorize the admission of an individual in the situation set forth in the aforesaid Article III (a). Commitment procedures in Missouri, when a patient is received from another state, are necessary unless the patient qualifies for admittance under the voluntary admittance provision of the Mental Health Act. The institution in the receiving state is not liable for the cost of such commitment.

November 9, 1959

Honorable Addison M. Duval, M. D.
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Dr. Duval:

Your recent request for an official opinion reads:

"I would appreciate your opinion concerning several questions dealing with the effectuation of legislation known as the Interstate Mental Health Compact which was authorized under House Bill No. 47 in the 70th General Assembly. Clarification of these questions will help materially in our setting up the necessary procedures.

"My questions are as follows:

1. What is the extent of authority of the Compact Administrator in effecting Article III(a)?
2. If the Compact Administrator authorizes the admission of such an individual (as mentioned therein) to a state hospital, (a) Can the Superintendent force the admission over the patient's objection, and (b) How long may the Superintendent hospitalize the patient before taking steps for legal commitment if this is indicated?
3. Under Article VII(a), are commitment procedures in a receiving state (Missouri) necessary? May the patient voluntarily waive such procedures? If commitment is necessary, who should properly bear the costs of commitment?

"Your early attention to this matter will be very much appreciated as this legislation becomes effective on August 29, 1959."

We will consider your several questions in the order in which they are stated above.

Honorable Addison M. Duval, M. D.

Paragraph (a) of Article 3 of House Bill No. 47 referred to by you above reads:

"Whenever a person physically present in any party state shall be in need of institution-
alization by reason of mental illness or mental
deficiency, he shall be eligible for care and
treatment in an institution in that state ir-
respective of his residence, settlement or
citizenship qualifications."

We note that the above paragraph makes a person who is physi-
cally present in any state which is a member of the Compact eligible
for care and treatment. It would seem that in this situation the
meaning of the word "eligible" would simply be that, regardless of
legal residence, a person could be admitted for treatment in a
Missouri mental hospital if he were physically present in Missouri.

We do not see that the Compact administrator would be in any
way involved by virtue of Article III (a).

Your second question, which is composed of parts (a) and (b)
is predicated upon the assumption that the Compact administrator
authorizes the admission of such an individual as is here under
consideration. Since we have held above that the Compact adminis-
trator is not involved in the admission to a state hospital of
such an individual as we are here considering, we feel that your
entire second question is thereby disposed of.

Your third question is in regard to the necessity of commit-
ment procedure in Missouri when this state receives a patient from
another state member of the Compact.

Numbered paragraph (a) of Article VII of House Bill No. 47
reads:

"(a) No person shall be deemed a patient of
more than one institution at any given time.
Completion of transfer of any patient to an
institution in a receiving state shall have
the effect of making the person a patient of
the institution in the receiving state."

The meaning of the above clearly is that when a patient from
another state is received in Missouri he is a patient of the Missouri
institution and of no other institution in any other state. We be-
lieve that his status is exactly the same as that of a person com-
mitted from Missouri by the regular Missouri commitment procedure
as set forth in Sections 202.780 through 202.870, RSMo Cum. Supp.
1957, and that unless similar commitment procedures are followed
in regard to the patient received from another state, then by

Honorable Addison M. Duval, M. D.

what authority will he be held in the Missouri institution? Not by any procedure which may have been held in the sending state, because by virtue of section (a) of Article VII, supra, he is cut off from such state. He is distinctly not a bi-state patient. It would seem that Missouri commitment procedure should be followed in order that Missouri not be placed in the position of holding a person and depriving him of his liberty without legal authority for so doing. This, of course, is clearly contrary to the fundamental laws of this state. Section 10, Article I of the Missouri Constitution states:

"That no person shall be deprived of life, liberty or property without due process of law."

In the case of *Ivie v. Bailey*, 5 SW2d 50, the Missouri Supreme Court stated (l.c. 54 [9, 10]):

"* * * By due process of law, defined in terms of the equal protection of the law, means, in each particular case, such an exercise of the powers of government as the settled maxims and rules of procedure sanction, and such safeguards for the protection of individual rights as those maxims and rules prescribe for the class of cases to which the one in question belongs. It means, in short, the law of the land. No requisite is lacking in these sections to afford the respondents due process or the equal protection of the law. The Constitution creates the liability, the statutory sections prescribe the remedy, and in the enforcement of the same, notice and a hearing is accorded to the respondents. Further than this, in the enforcement of the remedy prescribed by these sections no right was denied to the respondents to which any litigant would have been entitled under like circumstances. There is therefore no tenable ground of complaint on this score."

In the case of *State vs. Broadus*, 289 SW 792, the Missouri Supreme Court stated (l.c. 795 [5, 6]):

"* * * He therefore could not have been deprived of due process of law, which means nothing more than that every citizen shall hold his life, liberty, and property under the protection of the general law which governs society, and, in the concrete, that

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in a contest concerning these rights he will be given the opportunity to contest the propriety of each step in the action sought to be taken against him. City of St. Louis v. Railroad, 278 Mo. loc. cit. 211, 211 S. W. 671; Dartmouth College Case, 4 Wheat, 518, 4 L. Ed. 629. There is therefore no merit in this contention."

We believe that if Missouri commitment procedures are not followed that any patient received from another state not admitted as a voluntary patient would be subject to release from the Missouri institution on the filing of a writ of habeas corpus.

In connection with the above question you inquire whether, if commitment procedures are necessary, "who should properly bear the costs of commitment?" On July 27, 1959, this department rendered an opinion to you, a copy of which is enclosed, which we believe answers this question to the effect that the receiving institution in Missouri would not be liable for such costs.

Your final question is whether a patient received from another state may voluntarily waive such procedure of commitment.

Section 202.783, RSMo Cum. Supp. 1957, of the Mental Health Act reads:

"The head of a private hospital may and the head of a public hospital, subject except in case of medical emergency to the availability of suitable accommodations, shall admit for observation, diagnosis, care and treatment any individual who is mentally ill or has symptoms of mental illness and who, being sixteen years of age or over, applies therefor, and any individual under sixteen years of age who is mentally ill or has symptoms of mental illness, if his parent or legal guardian applies therefor in his behalf."

We see no reason why a patient received from another state would not be upon the same basis, so far as admittance of voluntary patients is concerned, as a Missouri resident who made a similar application.

CONCLUSION

It is the opinion of this department that: the Missouri Compact administrator of the Interstate Mental Health Compact is not given any authority under Article III (a) of House Bill No. 47 enacted by the 70th General Assembly;

Honorable Addison M. Duval, M. D.

That the Compact administrator in Missouri is not given authority to authorize the admission of an individual in the situation set forth in the aforesaid Article III (a);

That commitment procedures in Missouri, when a patient is received from another state, are necessary unless the patient qualifies for admittance under the voluntary admittance provision of the Mental Health Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

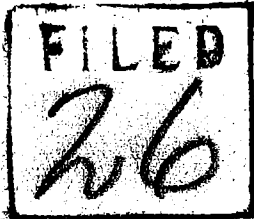
Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ar
Enclosure

LOTTERIES: The contest known as "Tangle Towns" is not a lottery.

February 23, 1959



Honorable Thomas F. Eagleton
Circuit Attorney, City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"In the Sunday, January 11, 1959 issue of the St. Louis Post-Dispatch there appeared an announcement of a contest entitled U.S. Tangle Towns. This contest is to be run on a daily basis for at least sixty-six days with the winners being announced at the end of said period. In the event of a tie, a series of tie-breaking puzzles will be published.

"The purpose of this letter is to request your official opinion as to whether U.S. Tangle Towns constitutes a lottery as prohibited by Sec. 563.430, RSMo 1949.

"Copies of the January 11th and 12th puzzles and the contest rules are enclosed for your consideration."

The operation involved in "Tangle Towns" is not complicated.

In an issue of the promoting paper, in this instance the St. Louis Post-Dispatch, there appears a square within which there appears, in the upper left hand corner, an outline of the state in which the town, whose name is sought, is located. The remainder of the square is taken up with letters of varying size, fitted together and in varying and unusual positions. These letters spell the name of a town which is located within the state whose outline appears in the upper left hand corner of the square. Below the square containing the letters and the outline map is a clue. In the January 12, 1959 issue of the St. Louis Post-Dispatch, this clue reads:

Honorable Thomas F. Eagleton

"This place is situated on a river. Even before the arrival of the railroads in the 1870's, cotton and hides were shipped in quantity. Oil-well machinery is manufactured here. The city has become known as a style center."

Below this is a dotted line upon which the participant is to write in the name of the city. Below this line is a place for the name and address of the participant. Below these lines there is a list of cities, one of which is the city referred to in the square. In the January 12 issue, there are twelve cities listed.

Sixty-six of these puzzles will be published. The contestant is not to send in the puzzles as they appear from week to week, but is to wait and send in all sixty-six at one time.

The entrants in this particular contest are limited to individuals residing in Missouri, Arkansas and Illinois (excluding Cook County.)

The rules, as set forth in the January 12 issue of the St. Louis Post-Dispatch, state that when the contest has run through its first phase of the sixty-six puzzles, that if it is found that there are entrants who have tied, that is who have successfully solved the puzzles, that what is called a "Tie-breaker" contest will be held for those persons who have successfully solved all of the sixty-six puzzles.

This "Tie-breaker" contest differs considerably from the type of contest which preceded it. The "Tie-breaker" works in the following manner: We are informed by the contest editor of the St. Louis Post-Dispatch that the "Tie-breaker" contest this year will follow the same pattern that it had followed in preceding years. As being representative of that procedure, we received on February 7, 1959, from Mr. Don Smith, a copy of the Times-Picayune, New Orleans, Louisiana, dated Wednesday, April 2, 1958. In that issue, the names of 590 towns and cities are set forth. In parallel rows, there are also set forth the following number of letters:

A-23	F-6	K-6	P-7	U-7
B-8	G-8	L-15	Q-2	V-4
C-11	H-8	M-10	R-18	W-5
D-10	I-14	N-17	S-14	X-2
E-22	J-3	O-18	T-13	Y-5
				Z-3

The contestant then is to make from the above number of letters submitted as many of the place names as are submitted as possible. One of the ideas, of course, is to use all or as nearly all as possible of the letters which are submitted. However, the matter is more complicated than that and we quote from the rules as set forth:

Honorable Thomas F. Eagleton

"8 POINTS should be credited for each place name spelled from the puzzle letters and listed on the blank provided.

"10 POINTS should be credited each time an 'O' and an 'N' appear together in a selected place name in that order, 'ON.'

"13 POINTS should be credited each time an 'A' and an 'R' appear together in a selected place name in that order, 'AR.'

"14 POINTS should be credited each time an 'I' and an 'N' appear together in a selected place name in that order, 'IN.'

"17 POINTS should be credited each time an 'E' and an 'L' appear together in a selected place name in that order, 'EL.'

"19 POINTS should be credited each time an 'O' and an 'R' appear together in a selected place name in that order, 'OR.'

"66 POINTS additional should be credited if all puzzle letters in the Official Tie-Breaking Puzzle are used. (This credit is in addition to all other credits listed.)

"7 POINTS should be DEDUCTED for each letter in the Tie-Breaking Puzzle not used in the place names selected."

A total of \$30,250 is offered in prizes. The first prize is \$15,000, the second \$5,000, the third \$2,000, and so on down the scale.

Upon the basis of the above fact situation, we shall attempt to determine whether the operation here involved falls within the prohibition of Section 563.430, RSMo 1949, which section prohibits the setting up and operation of a lottery and/or a gift enterprise.

In the 1937 case of State v. Globe-Democrat Publishing Co., 110 S.W.2d 705, the Missouri Supreme Court en banc set forth of what elements a lottery consisted, an opinion which has been followed by all Missouri appellate court opinions rendered subsequently. At l.c. 713 of the Globe-Democrat opinion, supra, (2, 3), the Court stated:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * *"

Honorable Thomas F. Eagleton

In order for an operation to constitute a lottery, all of the above elements must be present simultaneously. We wish now to examine the "Tangle Towns" contest to try to determine whether these three elements are present in it. Let us first see if the element of "consideration" is present.

The element of "consideration" has been the subject of attention in Missouri appellate courts and in previous opinions rendered by this department. An exact definition of this element is somewhat difficult but in general it may be stated that when an individual does an act which constitutes "consideration," as used in the Missouri lottery law, he has done something which he would not otherwise do and, in so doing, has conferred a benefit upon the party in behalf of whom and at whose suggestion the act was done. This department has held, for example, that when, in response to a promotion plan by a store, an individual walks into that store, signs his name on a perforated card, tears the card in two, deposits one half in a receptacle, puts the other half in his pocket and walks out of the store, that his act constitutes "consideration," as that term is used in the Missouri lottery law (Attorney General's opinion to Douglas W. Green, Prosecuting Attorney of Greene County of March 17, 1953.) In view of our finding, directly based as we believe upon Missouri appellate court opinions, that the act detailed above constitutes "consideration," then it would appear obvious that the acts necessary to be performed here would constitute this element. The contestant must in some way obtain sixty-six copies of the St. Louis Post-Dispatch. The contest rules, 4(b), state:

"It is not necessary to be a subscriber to the St. Louis Post-Dispatch or to buy copies of the newspaper to compete. You may, if you prefer, make copies of the puzzles by hand from issues borrowed from a friend or found elsewhere. * * *"

Actually, it is to be doubted that a single one of the thousands of persons who will undoubtedly participate in this contest will borrow a copy of the paper from a friend and laboriously copy the puzzle. A great many will doubtless buy a copy of the paper containing the puzzle for the specific purpose of obtaining the puzzle. They must then do the very considerable amount of work entailed in solving the puzzle or the puzzles and, at the conclusion of the contest, must either personally take their entries to the St. Louis Post-Dispatch or mail them in. Without further belaboring this point, it is perfectly obvious that, as the element of "consideration" has been construed by us and by Missouri appellate courts, that the operation of participating in this contest does beyond question constitute consideration." We, therefore, have present our first element.

Honorable Thomas F. Eagleton

It is obvious without discussion that the second element of "prize" is also present. As we noted above \$30,250 in cash will be given away.

We have now to consider whether the third element of "chance" is present and we again revert to the Globe-Democrat Publishing Co. case, *supra*. At l.c. 713, the Missouri Supreme Court stated:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element--chance--was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C.J. §5, p. 291; 17 R.C.L. §10, p. 1223; Waite v. Press Publishing Ass'n, 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

At l.c. 717, the Court stated:

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative

Honorable Thomas F. Eagleton

sense. This was directly decided in *Coles v. Odhams Press, Ltd.*, supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

At l.c. 717, et seq., the Court further stated:

"The respondent's theory is that the interpretation of rebus puzzles is a science; and that, since they can be solved by the application of these scientific principles, the element of chance is absent. Some of the decisions lend support to that view, such as *Hudelson v. State*, supra, *Stevens v. Times-Star Co.*, supra, and *Waite v. Press Publishing Ass'n*, supra. All of these cases conceded an expert might more nearly than a nonexpert approach a solution of the problems they were considering, and then swept away that concession by saying that nevertheless there remained unfathomable elements in the problems which nobody could solve. This might be taken to mean that, if contest problems can be solved at all, chance is eliminated. And the 'adverto-share' checker game cases seem to partake of that theory, though there is possibly an allowable distinction there.

"But such is not the true general rule. As was said in *People ex rel. Ellison v. Lavin*, supra, if a contest were solely between experts, possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted. What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in *Dillingham v. McLaughlin*, 264 U.S. 370, 373, 44 S.Ct. 362, 363, 68 L.Ed. 742, 'what a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the

Honorable Thomas F. Eagleton

contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it.

"Now, as regards the cartoons to be labeled in the 'Famous Names' contest. Without further discussion it is evident that an element of chance inhered in some of them--of guessing what titles had been selected by the creators. They had in mind a title for each cartoon before it was drawn, but they also introduced foreign elements in the later ones to make them more confusing or subtle. There were no fixed rules by which these cartoons could be solved by the rank and file of contestants. The respondent's witness Mr. Gregory Hartwick, who was an expert and had been drawing puzzles for 15 years, worked 2 days before he solved cartoon No. 80. Thirty-three out of the thirty-six contestants who made only one error were eliminated by this one cartoon, and twenty-five of these gave the same wrong answer. Mr. Hartwick said it was pure opinion with him that the designated title for Cartoon No. 79, Adolph Hitler, was better than Chancellor Dollfuss. The fact that out of more than 45,000 contestants only 2 gave correct answers to the entire 84 cartoons proves their solution was not a matter of skill and judgment, and that chance did have a proximate effect on the final result. And the circumstance that the two winners, Mr. Kraus and Mrs. Hicks, were not experts does not establish the contrary; indeed, it indicates the contest in its final analysis was controlled by chance. We think it was a lottery."

We believe that the above sets forth the principles of law which are determinative with respect to this element of "chance." It will be noted that the rule laid down above is that although there may be present in a contest some element of skill, yet that if chance is the dominant element, that the holding will be that "chance," as used in the lottery law, is present. We believe that we may, therefore, justifiably assume that the rule would also be that even though some element of "chance" was present in an operation that it would not be held to be "chance" if that element was

Honorable Thomas F. Eagleton

subordinate and if skill was dominant. In the light of this principle, and of the other principles laid down in the Globe-Democrat Publishing Co. case, supra, we do not believe that it can be said that the element of "chance" is present in the "Tangle Towns" operation nor do we concede that it is present at all in that operation, although, as we stated above, it could be in a subordinate degree if skill were dominant, in which instance the operation would not be considered to contain the element of "chance." We reach this conclusion for the following reasons.

We will first consider that portion of the contest which consists of the 66 puzzles. In regard to this, we note that there is only one correct answer to any one of these puzzles. In the specific puzzle referred to by us above, one of the names of the twelve towns submitted and only one is correct and this obviously is "Dallas." Thus, there is in this portion of the contest a very clear distinction between an answer which is correct and one which is not.

In the second place, it would seem apparent that a person who was possessed of a greater knowledge of history than other persons would have a decided advantage in view of the nature of the clues which are affixed to each puzzle. We think this is evident from the nature of the clue given above.

In the third place, it would seem to us that probably the most determinative element in a successful solution to these puzzles would be careful study and hard work together with the qualities of intelligence and general knowledge. So far as we can see, there is, as we stated, very little, if any, of the elements of "chance" present. The contestant either gets the correct name or he does not and to simply guess at the name out of the names submitted would give the contestant a very small percentage opportunity of getting the right answer. For these persons, we do not believe the element of "chance" as it is used in the lottery law of Missouri is present in any but a purely negligible degree in this first phase of the Tangle Towns contest.

We also believe that what we have said about this first phase is even more true with respect to the second or "Tie-breaker" operation. In it, of course, what we have said with respect to there being only one right solution does not apply, but for the rest it seems to us that the qualities which would win would be a keen intelligence and the expenditure of an immense amount of time and work. It is inconceivable to us that anyone could say that using the number of letters which are submitted in making out the list of towns and particularly in using those letters in the relationships to each other which are set forth in the "Rules for

Honorable Thomas F. Eagleton

Scoring" could be a matter of "chance." As we stated above, it would seem that the qualities which would succeed in this phase of the contest would be intelligence, knowledge and careful work. It would seem to us that the element of "chance" would be even less in this phase of the contest than in the first phase and that even in the first phase that element is very slight and certainly cannot be said to be anywhere near "dominant."

Since one of the necessary three elements to constitute lottery is not present, we do not believe that the Tangle Towns contest is a lottery.

CONCLUSION

It is the opinion of this department that the contests known as "Tangle Towns" is not a lottery.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:om:hw

**ELECTIONS: COSTS
OF REGISTRATION AND
CANVASS IN GENERAL
ELECTION IN CLAY
COUNTY, MISSOURI:**

We conclude that the city of Kansas City and Clay County must proportionately share the cost of registration and canvass of voters by mail for the November General Election, 1958, according to the population Kansas City bears to the total population of Clay County, all of which is set out and authorized by Section 119.180, RSMo 1949.

April 21, 1959



Board of Election Commissioners
County Court House Annex
7 South Water Street
Liberty, Missouri

Dear Sirs:

We are in receipt of your recent letter requesting our official opinion on the following question:

"Request for Attorney General's opinion as to whether Kansas City Missouri, under the provisions of Chapter 119 of the Revised Statutes of Missouri, 1949, shall bear their proportionate share of the costs of registration and canvass of voters for the November, 1958, General Election, although no City candidates or charter or bond questions appeared on the ballot for said election?

"Reference is made to your letter to the Honorable James L. Williams, County Counselor for Jackson County, Missouri, dated October 27, 1958, wherein you find that the cost of a primary election canvass is a general expense which is to be paid both by Jackson County and Kansas City under the provisions of Chapter 117 and which we feel should apply to Kansas City for the November General Election of 1958, in regards to Clay County Missouri. Kansas City has denied any liability for registration or canvass conducted for said election on the basis of no municipal issues and that the canvass was conducted by mail."

We wish to point out at the outset of this opinion that your question involves expenses concerning the registration and canvass of voters for the November, 1958, General Election and that said canvass was conducted by mail.

Your question basically involves interpretation of Section 119.180, RSMo Cum. Supp. 1957, which reads as follows:

Board of Election Commissioners

"1. In all counties in this state affected by this chapter, the board of election commissioners, clerks of the board, and all assistants employed by the board of election commissioners, except as otherwise herein provided, shall be paid as follows: The members of said board of election commissioners as such, and as members of the board of registry, as herein provided, shall each receive a salary of one thousand two hundred dollars per year, and assistants and clerks employed by the day by the board of election commissioners shall receive a salary of not more than eight dollars per day, and the same shall be paid upon a certificate of the board that the services have been rendered. All expenses incurred by the board of election commissioners shall be paid in like manner.

"2. When any county of this state has within its boundaries any part of a city of more than four hundred thousand population, according to the last United States decennial census, all such salaries and expenses shall be paid proportionately by such city and county, with such city paying such proportion as its population within such county bears to the total population of the county.

"3. In all city elections, general or special, such city shall pay judges and clerks of election for their services under this chapter, and shall pay their proportionate share for judges and clerks if a city proposal of any kind is to be submitted to the voters at any general, county or state elections.

"4. At all general, county, state or other elections which include officers elected throughout a whole county the county shall pay the judges and clerks of election for their services under this chapter in connection with the election held within such county."
(Emphasis supplied.)

Board of Election Commissioners

In this case, Kansas City is within the boundaries of Clay County and is a city of more than 400,000 population. Therefore, the above statute which is a part of Chapter 119, RSMo Cum. Supp. 1957, is applicable and the question narrows down to an interpretation of paragraph 2 of Section 119.180, supra, where provision is made for city and county proportionately paying "all such salaries and expenses" as its population bears to the total population of the county.

Section 119.280, et seq., provides that the board of election commissioners shall constitute the board of registry. Also, it sets forth the duties of the board of registry, how the registration records shall be kept; provides for canvass of the precincts; and that the board of election commissioners shall deliver election supplies to the board of registry. No specific provision is expressly made for the payment of expenses of the aforesaid costs of registration and canvass.

We next direct your attention to Section 119.170 which authorizes the board of election commissioners to provide supplies, etc., and reads as follows:

"Said board of election commissioners is hereby authorized to provide, subject to the provisions of section 50.660, RSMo, all necessary ballot boxes, registration books, verification lists, poll books, tally sheets, booths, printed ballots, blanks, stationery and all necessary supplies and equipment for the conduct and holding of registrations and elections, including primary elections, and for every incidental purpose connected herewith. Said election commissioners shall also be authorized to require bonds sufficient in sum to insure prompt and faithful compliance with all such contracts and to contract for or rent the polling places and places of registration and outfit and equip the same and secure light, heat, and other conveniences for same. In all cases where the printing of official ballots is awarded to a bidder, the board of election commissioners may require the constant guarding of such ballots by a guard of their own selection, at the expense of the contractor, from the beginning of the printing of the same

Board of Election Commissioners

until their safe delivery at the office of said board of election commissioners. The salaries and expenses of said board of election commissioners shall be audited and paid as the salaries and expenses of other county officers are audited and paid."

These statutes relating to registration, canvass, supplies and payment of expenses must be read in pari materia and, if possible, effect given to each clause and provision. See Davenport v. Teeters, Mo. App., 273 S.W.(2d) 506, 510 (1,2).

Paragraph (1), Section 119.180, supra, provides in essence that the salaries and expenses of the board of election commissioners whose members also serve on the board of registry shall be paid upon certificate of the board that services have been rendered.

Section 119.170, supra, provides in part as follows:

"* * * The salaries and expenses of said board of election commissioners shall be audited and paid as the salaries and expenses of other county officers are audited and paid."

Reading these two sections in pari materia, it is apparent that counties are liable to pay all salaries and expenses of the board of election commissioners after said board certifies it has rendered services.

Paragraph (2) of Section 119.180, supra, we believe, creates an exception to the aforesaid county liability and provides that if a county has a city of more than 400,000 population within its boundaries the "salaries and expenses" shall be proportionately paid by said city and county according to the population the city bears to the county. The terms "salaries and expenses" in paragraph (2) obviously refers to the "salaries and expenses" of the board of election commissioners and board of registry provided for in paragraph (1).

It is evident the Clay County Board of Registry incurred expenses while registering and canvassing the voters in the 1958 general election. There being no express provision for payment of the board of registry's expenses and since its members compose the board of election commissioners, these expenses would

Board of Election Commissioners

generally be the sole liability of the county under the provisions of paragraph (1), Section 119.180 and Section 119.170, supra. However, in this case, since Kansas City is a city of more than 400,000 and is within the boundaries of Clay County, said expenses come within the purview of Section 119.180, paragraph (2), supra.

We therefore conclude, after reading Section 119.180, paragraph (2), and Section 119.280, supra, in pari materia, that Kansas City is liable for its proportionate share according to the population it bears to the total population of Clay County for the costs and expenses of the registration and canvassing the returns by mail of the general election held last November, 1958. We believe this result is reasonable and is what the legislature intended by paragraph (2), Section 119.180, supra.

CONCLUSION

We therefore conclude that the city of Kansas City and Clay County must proportionately share the cost of registration and canvass of voters by mail for the November general election, 1958, according to the population Kansas City bears to the total population of Clay County, all of which is set out and authorized by Section 119.180, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

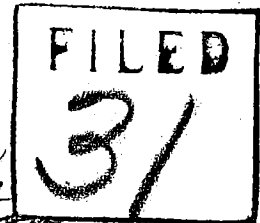
John M. Dalton
Attorney General

JBA:om

PROSECUTING ATTORNEYS: In proceedings contemplated by Chapter 202, RSMo 1949, no specific duties placed upon prosecuting attorneys to prepare initial papers seeking commitment of persons to State hospitals, except under Sec. 202.710, RSMo 1949, providing for initiating of criminal sexual psychopath hearings. In other cases, prosecuting attorneys' interest must stem from interest of county and State, and their services must be reserved to protect such interests.

July 23, 1959

*See 10-1961 letter to
Boulware dated July 7, 1961
holding sheriff must file & is represented by
Honorable Patrick O. Freeman, Jr. Pros. Atty who
Prosecuting Attorney
Oregon County
Thayer, Missouri
prepares petition*



Dear Sir:

This opinion is rendered in reply to your request reading as follows:

"As Prosecuting Attorney of Oregon County, I am often called upon to prepare all of the proceedings in Probate Court to have people declared insane and also to prepare both Voluntary and Involuntary Commitments to Mental Institutions, both public and private.

"I have performed these services free gratis as Prosecuting Attorney whether there was crime involved or not.

"I would therefore appreciate an opinion from your office regarding whether or not it is the duty of the Prosecuting Attorney of a County of the 4th class to prepare all insanity proceedings and hospitalization commitments both in cases involving crime and not involving crime."

Sections 56.010 to 56.620, RSMo 1949, as amended, pertain to prosecuting attorneys generally over the State, and such official in a fourth class county is governed by the statutes cited. Attention is directed to applicable provisions thereof.

Section 56.060, RSMo 1949, provides, in part, as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute

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"forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county;
* * *."

Section 56.070, RSMo 1949, provides, in part, as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. * * *"

Section 56.080, RSMo 1949, provides as follows:

"In all criminal cases where any person or persons are brought up on writs of habeas corpus before a judge of any court of record, it shall be the duty of such attorney to attend upon the hearing of such application on behalf of the state."

Section 56.090, RSMo 1949, provides as follows:

"No magistrate or judge of a court of record having jurisdiction shall allow any such cases as are alluded to in sections 56.070 and 56.080 to be tried before him, unless the prosecuting attorney shall be present, or some one properly qualified to prosecute for him; and it shall be the duty of any magistrate, before trying such cases as are alluded to in sections 56.070 and 56.080, to give due notice to the prosecuting attorney."

Section 56.100, RSMo 1949, provides as follows:

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"The prosecuting attorney shall, without fee, give his opinion to any magistrate court, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Sections 56.060 to 56.100, RSMo 1949, quoted above, clearly disclose the general duties of the prosecuting attorney in representing the state and county where interests of either political body are concerned.

We now consider whether competency proceedings under general or special statutes are such as to create a state or county interest requiring a prosecuting attorney to hold himself available to render services to the state or county in such proceedings.

In State ex rel. Terry v. Holtkamp, 330 Mo. 608, 51 S.W.(2d) 13, the Supreme Court of Missouri alluded to the character of a lunacy proceeding in the following language found at 330 Mo. 608, l.c. 622:

"A lunacy proceeding is a civil, as distinguished from a criminal, proceeding; yet it is a proceeding in personam by the State; the public is interested in the welfare of the person alleged to be insane."

In State ex rel. Wilkerson v. Skinker, 344 Mo. 359, 126 S.W. (2d) 1156, the Supreme Court of Missouri described lunacy proceedings in the following language found at 344 Mo. 359, l.c. 370,371:

"But it is also true that in these lunacy proceedings, the State, as parens patriae--the community--society--has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public."

To emphasize the interest of the public in lunacy proceedings, we quote the following from State ex rel. Paxton v. Guinotte, 257 Mo. 1, l.c. 11,12,16:

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"Who are the parties in interest in an inquest de lunatico under our statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse, and (b) the person whose mind is under suspicion, the alleged crazy person, that he may not suffer from the detention of his property or person in the custody of another. * * * If then it be that the interest of the petitioner in the case (costs which our statute regulates excepted), is thus but negligible, it would seem to follow that when an inquest touching the sanity of a person is thus begun in this State under our statute, the interest of the petitioner being found in the ancient history and logic of the case to be utterly subordinate to the interest of the public and to that of the person under inquiry, the petitioner may not dismiss the inquest unless the probate court consent."

The statutes cited above disclose the duty imposed upon a county prosecuting attorney to represent the state and county in civil as well as criminal proceedings in which such political bodies have an interest. The case law cited above discloses in a general way how the state and county are interested in competency proceedings.

The request for this opinion points the inquiry to "insanity proceedings and hospitalization commitments both in cases involving crime and not involving crime," but by telephone communication with the person requesting this opinion, the inquiry is narrowed to a consideration of proceedings contemplated by Chapter 202, RSMo 1949, as amended.

Chapter 202, RSMo 1949, as amended, treats subject headings of (1) Division of Mental Diseases and State Hospitals, (2) Missouri State Schools, (3) State Aid to County and City Hospitals, (4) Criminal Sexual Psychopaths, and (5) Commitment and Hospitalization of Mentally Ill.

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Treatment will first be given to the subject heading, Commitment and Hospitalization of Mentally Ill, found at Sections 202.780 to 202.870, RSMo Supp. 1957. In referring to statutes in this subject heading, all references are to RSMo Supp. 1957. Section 202.780 defines a "mentally ill individual" as "an individual having a psychiatric or other disease which substantially impairs his mental health who may or may not be legally insane." Section 202.863 provides that "patients admitted to the state hospitals under the provisions of this law shall be classified as private patients or as county patients." Patients to be admitted to the state hospitals under this law are further classified as voluntary (Section 202.783) and involuntary (Section 202.793), the latter being admitted under four different procedures described in Section 202.793 as follows:

- "(1) Hospitalization on court order, judicial procedure;
- (2) Hospitalization on medical certification, standard nonjudicial procedure;
- (3) Hospitalization on medical certification, emergency procedure;
- (4) Hospitalization without indorsement or medical certification, emergency procedure."

Section 202.797 outlines the various steps to be taken to obtain hospitalization on medical certification, standard nonjudicial procedure, listed at (2) above. In such statute, we find no duties imposed upon the prosecuting attorney of the county. Section 202.800 outlining procedures resulting in hospitalization on medical certification, emergency procedure, listed at (3) above, imposes no duties on the prosecuting attorney. Section 202.803 outlines procedure for hospitalization without medical certification, emergency procedure, listed at (4) above, without prescribing any duties for the prosecuting attorney. Section 202.807 outlines procedure for hospitalization on court order, judicial procedure, listed at (1) above. This procedure is initiated by filing of an application with the probate court by a "friend, relative, spouse, or guardian of the individual, or by a licensed physician, a health or public welfare officer, or the head of any public or private institution in which such individual may be." Under this procedure, the statute provides that "an opportunity to be

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represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel." In this procedure in the probate court, we find no duties placed upon the prosecuting attorney.

Once a person is about to be hospitalized under any of the four procedures described in the preceding paragraph and set forth in Sections 202.797, 202.800, 202.803 or 202.807, we find that under Section 202.813, provision is made for such person to be hospitalized as a "county" patient. This is accomplished by a request being directed to the county court, or the probate court if the individual to be hospitalized is a resident of the city of St. Louis or a class one county, by "a person having a proper interest in the individual's hospitalization." In this procedure, we note an absence of any statutory provision placing duties upon the prosecuting attorney to file an application to have the person declared to be a county patient. However, once the person to be hospitalized is designated as a "county patient," the interest of the county is apparent, and, if called upon, the prosecuting attorney should advise the county court in reaching its decision upon such issue. Under certain circumstances, as provided in Section 202.823, we note that persons hospitalized in state institutions under this law may be transferred to facilities maintained by an agency of the United States, but such statute also provides:

" * * * No person shall be transferred to an agency of the United States if he is confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of mental illness unless prior to transfer the court originally ordering confinement of such person enters an order for the transfer after appropriate motion and hearing. * * * "

In the preceding quotation from Section 202.823, we find abundant reason for a prosecuting attorney to remain aloof from initial proceedings seeking hospitalization of persons under this particular law in order that he may at all times be in a position to impartially represent the county. Therefore, in review of this particular subject heading of Chapter 202, RSMo 1949, as amended (Secs. 202.780 to 202.870, RSMo Supp. 1957) entitled "Commitment and Hospitalization of Mentally Ill," we find no statutory duty imposed upon prosecuting attorneys to prepare original papers looking to the initial hospitalization of persons as provided by such

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law. The proceedings authorized by this law are not to be considered as dependent upon guardianship proceedings set forth in Chapter 475, RSMo Supp. 1957.

Next, we discuss the subject heading entitled "Division of Mental Diseases and State Hospitals" found in Chapter 202, RSMo 1949, as amended, at Sections 202.010 to 202.580, RSMo 1949, as amended. In this group of statutes, procedures for commitment to state hospitals are available for voluntary and involuntary commitment of drug addicts. Voluntary commitment is effected under procedures outlined in Section 202.370, RSMo 1949, and under such statute no duties are placed upon prosecuting attorneys to aid in initiating such procedures. Involuntary commitment of drug addicts after hearing is initiated by information "signed by any resident of the county of such person's residence and filed with the probate court thereof." Here, we find no duty placed upon the prosecuting attorney to aid in initiating such involuntary proceedings. Under Sections 202.450 and 202.470, RSMo 1949, indigent sane persons are entitled to diagnosis, treatment and temporary care at any state hospital upon proper certification from the county court. While this procedure spells out no duties to be performed by the prosecuting attorney, the county court may call upon him for such advice and assistance as it may need in the premises, such service to be rendered in compliance with his general duties found in Chapter 56, RSMo 1949, and pointed out in the forepart of this opinion.

The third subject heading in Chapter 202, RSMo 1949, to be discussed is "Missouri State School" found in Sections 202.590 to 202.660, RSMo 1949. Admission to units of this state school is provided for in Section 202.610, RSMo 1949, reading as follows:

"1. There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accommodated, shall be received into the school by the division of mental diseases on such terms

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"as shall be just; and shall be designated as private patients.

2. Feeble-minded and epileptics shall be received into the school only upon the written request of the persons desiring to send them, stating the age, place of nativity, if known, Christian and surname, the town, city or county in which such persons respectively reside, and the ability of the respective parents or guardians or others to provide for their support in whole or in part; and if in part only, stating what part; and stating also the degree of relationship or other circumstances of connection between the patients and the persons requesting their admission; which statement, in all cases of state patients, must be verified by the affidavit of the petitioners and of two disinterested persons, and accompanied by the opinion of two qualified physicians, all residents of the same county with the patient, and acquainted with the facts and circumstances stated, and who must be certified to be credible by the county court of that county, or, in the case of the city of St. Louis, by the hospital commissioner or the assistant hospital commissioner of said city; and such county court, or, in the case of the city of St. Louis, the comptroller of said city, must also certify, in each case, that such patient is an eligible and proper candidate for admission to the colony.

3. State patients, whether of age or under age, may also be received into the colony upon the official application of any judge of a court of record; provided, that the county in which such state patients as are now inmates of said school, resided when they were admitted, and the county wherein such state patients herein admitted may reside at the time of such admission, shall be liable for and shall pay into the treasury of said school the sum of

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"five dollars per month for each of such state patients."

Under paragraph 2 of Section 202.610, supra, we note that feeble-minded and epileptics are to be received into the school only upon written request of the persons desiring to send them, be they parents, guardians or others. Those who are to be admitted to the school as "state" patients will have a portion of their cost of care, to the amount of five dollars per month, paid by the county of their residence. Throughout this law, Sections 202.590 to 202.660, RSMo 1949, we find no specific duties placed on the prosecuting attorney to aid in obtaining initial commitment. However, we do find the interest of the county present when costs are to be defrayed to any extent by the county. This demonstrates that the prosecuting attorney must reserve his services for the benefit of the county court.

The fourth subject heading in Chapter 202, RSMo 1949, to be discussed is "State Aid to County and City Hospitals," found in Sections 202.670 to 202.690, RSMo 1949. Under these statutes, we are not concerned in any way with admission to hospitals and no duties of the prosecuting attorneys are apparent.

The fifth subject heading in Chapter 202, RSMo 1949, to be discussed is "Criminal Sexual Psychopaths," found at Sections 202.700 to 202.770, RSMo 1949. Under Section 202.710, RSMo 1949, these proceedings are to be initiated by petition filed by the prosecuting attorney either on his own information or on information furnished to him by other persons. To the extent that this group of statutes places definite duties upon the prosecuting attorney, he is obliged to carry out those duties, but only to that extent. Otherwise, his interest in the proceedings is to be weighed in relation to the county's interest and to that extent his services are available to the county. The person to whom the inquiry under these statutes is directed is, by Section 202.730, RSMo 1949, entitled to counsel, thus demonstrating that subsequent to filing the original information, the prosecuting attorney does not represent the person informed against or those interested in him.

CONCLUSION

It is the opinion of this office that in all proceedings contemplated by Chapter 202, RSMo 1949, as amended, no specific duties

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are placed on prosecuting attorneys in preparing initial papers looking to commitment of persons to state hospitals, except where they are charged with the duty to file informations under Section 202.710, RSMo 1949, initiating criminal sexual psychopath hearings. In all other cases contemplated by Chapter 202, RSMo 1949, the interest of the prosecuting attorneys must stem from the interest of the county and state, and their services are to be reserved to protect such interests.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

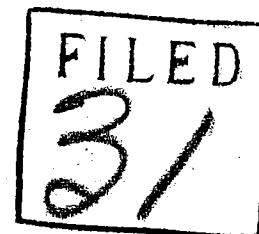
John M. Dalton
Attorney General

JLO'M:om

SPECIAL ROAD DISTRICTS: 1) Upon dissolution, a special road district
ROAD DISTRICTS: formed under Sections 233.320 - 233.345, RSMo
ROADS AND BRIDGES: 1949 the territory contained therein becomes un-
TAXATION: organized territory; 2) Under the provisions of
ELECTIONS: Section 137.065, RSMo 1949, the county court on
COUNTY: its own motion may submit a proposition to increase the
tax rate and upon the filing of a petition containing
names of 10% or more of the qualified voters, they must submit the pro-
position; 3) The apportionment provisions of Section 137.070, RSMo
1949, are applicable only where the tax rate approved by the voters is
less than the combined rate for both county and township organizations.

October 8, 1959

Honorable William Y. Frick
Prosecuting Attorney
Putnam County
Unionville, Missouri



Dear Mr. Frick:

This is in response to your request for an opinion dated
July 23, 1959, which reads as follows:

"I have been requested by our County Court to
seek opinions from your office concerning
several matters now facing said Court.

"The first question involves the following
facts:

Many years ago, a special road district
known as Blackbird Special Road District
was legally formed out of a portion of
Lincoln Township. A proper petition to
dissolve said special road district was
filed with the County Clerk on March 17,
1959, and said district was ordered dis-
solved by said Court on June 1, 1959, and
a trustee appointed.

The County Court, on March 2, 1959, approved
the petition of Lincoln Township asking for
a special election to vote on a special road
and bridge levy for the years 1959-1960. The
election was held on March 31, 1959, and the
levy approved by the voters at such election.
Since the Blackbird Special Road District had
not, at the time of said election, been dis-
solved, the residents of said road district
did not vote in said election.

"The question for determination is whether the
Special Road and bridge levy can be applied to,

Honorable William Y. Frick

and collected from the residents of, and property lying in the former Blackbird Special Road District.

"The Second Question for determination involves a construction of VAMS, Section 137.065 and Section 137.070.

1. Is the proper construction of paragraph Two of Section 137.065 that the County Court, may, in its discretion call and conduct a special election submitting a proposition to the voters for the increase of tax rates, and must call such election when petition therefore by not less than 10% of the qualified voters of said counties?

2. In counties under township organization, where an increase in taxes is approved by the voters as provided in Section 137.065, must such increase be apportioned between the townships and the County as provided in Section 137.070.

"If any additional information is necessary to clarify these requests, please advise me. If there are prior opinions of your office which bear upon any of these points with sufficient directness as to render a further opinion unnecessary, I would be most happy to receive the copies thereof."

You inquire as to whether the special thirty-five cent tax levy authorized by the voters of the Lincoln Township General Road District on March 31, 1959, may be levied against the property lying within boundaries of the dissolved Blackbird Special Road District.

In our telephone conversation of August 21, 1959, you advised that many years ago the Lincoln Township Board of Trustees formally declared that Lincoln Township would constitute a general road district. You further advised that some time thereafter Blackbird Special Road District was incorporated, the territory comprising Blackbird Special Road District being located in Lincoln Township. After Blackbird Special Road District was incorporated, the Township Board of Trustees did not take any action to re-define the boundaries of Lincoln Township General Road District to exclude that portion which was incorporated as Blackbird Special Road District. On June 1, 1959,

Honorable William Y. Frick

the special road district was dissolved. The Township Board of Trustees has not taken any action to form the territory that comprised the dissolved district into a general road district or to make it a part of Lincoln Township General Road District.

The answer to your inquiry depends upon the status of the territory comprising the dissolved district after the dissolution. If the territory therein automatically became a part of Lincoln Township General Road District upon the dissolution of Blackbird Special Road District, then it would appear that the tax should be levied and collected even though the voters living within the dissolved district were not permitted to vote at the election. There is a long line of cases holding that the property lying within an area annexed to municipalities are subject to tax levies voted prior to the annexation to discharge bonded indebtedness and other municipal obligations. We believe that these cases would be applicable to the instant situation if the territory were annexed to the general road district upon dissolution. On the other hand, if the territory did not automatically become a part of Lincoln Township Road District and if the Township Board of Trustees has not taken any action with respect to making it a part of the general road district, then it would appear that the tax should not be levied and collected.

Sections 233.320 to 233.445, inclusive, RSMo 1949, govern the formation, operation and dissolution of special road districts in township organization counties. Sections 233.425 to 233.445, supra, provide for the dissolution of such districts. It is to be noted that there is nothing in these sections regarding the status of the territory following dissolution of the special road district.

We have been unable to locate any cases that have considered the status of the territory which comprised a dissolved special road district. However, we have found cases involving the dissolution of consolidated school districts. We believe the holding in these cases is applicable to the dissolution of special road districts.

It is generally held that, unless otherwise provided by statute, territory detached from one school district and added to another does not automatically return to, or again become part of, the former district on abolition of the latter. 78 C.J.S. 798.

In State ex inf. McGinnis Pros. Atty. ex rel. Kemble et al. v. Consolidated School District No. 3, Pike County et al. 209 S.W. 96, the trial court ordered a consolidated school district dissolved and further ordered that the several school districts out of whose territory said consolidated district was formed, be restored to all the

Honorable William Y. Frick

rights they had prior to the establishment of the consolidated district. On page 98 of the opinion the Court stated as follows [1,2]:

"Plainly the judgment of the circuit court which sought to resuscitate the defunct school district was de hors the pleadings in this case and de hors the power of the court to render. Laws 1913, p. 723, §6; State ex inf. v. Smith, 271 Mo. loc. cit. 177, 196 S.W. 17. If the present consolidated school district was legally established (which is the basic allegation of relator's suit), then its dissolution, even if validly decreed, would not, per se, restore the corporate franchises of the previous school districts, nor restore its directors to their former offices and functions. Neither was it within the judicial power of the circuit court, after dissolving the consolidated district, to re-create and restore the former districts or their officers, even if such issue had been within the pleadings, for when the former districts ceased to exist as such, the terrain comprehended within them became a part of the new consolidated districts formed thereof, and upon a valid dissolution of the latter such terrain would become 'unorganized territory' (R.S. 1909, §10776), and could thereafter be organized into school districts only by the method prescribed in the statute and upon the votes of its inhabitants (R.S. 1909, §10836). It is clear, therefore, that so much of the judgment of the learned trial court as undertook to reincorporate the former school districts and refunction their officers was outside the issues on trial, as well as outside the pale of judicial authority. So much, therefore, of the decree in the present case as undertook to do this, was a simple nullity." (Emphasis added.)

See also Hydesburg Common School District of Ralls County, et al. v. Rensselaer Common School District of Ralls County, 218 S.W.2d 833, wherein the court stated that upon the dissolution of a consolidated district the territory which comprised the former consolidated district becomes unorganized territory.

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In view of the foregoing, we are of the opinion that the territory which comprised the dissolved special road district did not automatically become a part of the Lincoln Township General Road District at the time of dissolution. It became unorganized territory upon the dissolution and it remains as such until such time as the Township Board of Trustees forms it into a general road district or annexes it to the existing general road district. Since it is unorganized territory and not a part of Lincoln Township General Road District, the property therein is not subject to the special tax levy authorized by the voters of the general road district on March 31, 1959.

You inquire as to whether paragraph 2 of Section 136.065, RSMo 1949, means that the county court may, on its own motion, submit a proposition to the qualified voters of the county to increase the tax rate beyond the maximum specified in paragraph 1 of said section, but must submit such a proposition to the voters when a petition containing the signatures of at least ten per cent of the qualified voters of the county is filed with the county court requesting them to do so.

We are of the opinion that your interpretation of paragraph 2, Section 137.065, *supra*, is correct.

Paragraphs 2 and 3 of Section 137.065 reads as follows:

"2. County courts are hereby authorized to call and conduct a special election under the laws governing such election for the purpose of increasing maximum tax rates herein specified, or to submit a proposition for the increase of such rates at any regular election, and shall submit any such proposition at either a special or regular election when petitioned therefor by not less than ten per cent of the qualified voters of the county as determined by the total vote cast for governor in the last preceding general election for governor, and the proposition shall be as follows on the ballot: 'For a levy for county purposes of on the hundred dollars valuation' and 'Against a levy for county purposes of on the hundred dollars valuation.'

"3. Special elections called under the provisions of this section shall be limited

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to one election for each twelve month period."

From the language used in paragraph 2 of said section, it is quite obvious that the county court may on its own motion submit a proposition to increase the tax rate to the voters of the county, but in the absence of a petition containing the signatures of ten per cent or more of the qualified voters that they submit the proposition to a vote they are not required to do so. However, when a petition containing the signatures of ten per cent or more of the qualified voters is filed with the county court requesting them to submit such a proposition to the voters, then it is mandatory that they do so and they have no discretion in the matter.

It is to be noted that paragraph 3 of Section 137.065, supra, provides that only one special election to vote on a tax increase proposition may be called for each twelve-month period. Therefore, if the county court submits a proposition to increase the tax rate at a special election called for that purpose and such proposition is defeated, another special election may not be called for at least twelve months to vote upon such a proposition, even though a petition bearing the necessary number of signatures is filed with the court requesting such a submission to the voters.

You inquire whether in counties under township organization where an increase in the tax rate is approved by the voters as provided in Section 137.065, supra, must such increase be apportioned between the townships and the county as provided in Section 137.070, RSMo 1949.

Section 11(b), Article X, Constitution of Missouri, places certain limitations on local tax rates. That portion of Section 11(b) pertinent to the question herein reads as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For counties -- thirty-five cents on the hundred

Honorable William Y. Frick

dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation and fifty cents on the hundred dollars assessed valuation in all other counties;"

* * * * *

Section 11(c), Article X, Constitution of Missouri, permits the limitation set out in Section 11(b) to be increased by a favorable vote to do so. Section 11(c) reads as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 137.065, supra, a portion of which is set out hereinabove, implements Section 11(b) and 11(c), Article X, Constitution of Missouri. Paragraph 1 of said section provides that the tax rate for county purposes in counties having an assessed valuation of less than \$300,000,000 shall not exceed fifty cents on the one hundred dollar valuation. Paragraph 2 authorizes the tax levy for county purposes to be increased above the limitation set out in paragraph 1 upon a favorable vote of the qualified voters of the county to do so. Section 137.070, RSMo 1949, recognizes that the taxes levied by the township board of trustees in township organization counties are to be considered as taxes for county purposes. It provides that the amount of revenue estimated by the county court for county purposes and the amount estimated by the township board for township purposes shall be added together to determine whether the tax rate exceeds the limitation imposed by Section 11(b), Article X, Constitution of Missouri.

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See also State ex rel. Conrad v. Piper, 214 Mo. 439, 114 S.W. 1, which holds that taxes levied by township boards are considered part of the taxes levied for county purposes.

There is no constitutional limitation on the tax rate that may be imposed by a township. The only constitutional limitation is that imposed by Section 11(b), Article X, Constitution of Missouri with respect to the tax rates for county purposes. However, there is a limitation of twenty cents per one hundred dollar assessed valuation imposed by Section 65.380, RSMo 1949, which reads as follows:

"The township board of directors shall, annually, not less than twenty nor more than sixty days prior to the first day of September, make out and file with the clerk of the county court of their county an estimate of the amount of money required to defray the expenses of said township during the next ensuing year. Said estimates shall be signed by the president and attested by the clerk of the board. The clerk of the county court shall cause the same to be placed on the tax books of said township; provided that the amount of such expenses shall not exceed in any one year twenty cents on the hundred dollars assessed valuation of the taxable property within said township."

Section 137.070, supra, reads as follows:

"In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate per cent on the one hundred dollars valuation allowed by section 11 of article X of the Constitution of Missouri for county purposes, then it shall be the duty of the county court to apportion the tax for county purposes between the county organization and the township organization in the following manner, to wit: Eighty per cent of the taxes which may be legally levied for county purposes

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shall be apportioned to the county organization for county purposes, and twenty per cent of such taxes shall be apportioned to the township organization for the purposes provided by section 65.360, RSMo 1949 of the township organization law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the constitution. (11047, A. L. 1945 p. 1778)"

That portion of the above quoted section which provides for apportionment of the tax for county purposes between the county organization and the township organization is not applicable as long as the combined tax levy does not exceed fifty cents per one hundred dollar assessed valuation. For example, if the estimate of the township board of trustees requires a tax rate of twenty cents per one hundred dollars assessed valuation and the estimate of the county court requires a tax rate of thirty cents per one hundred dollar assessed valuation, then the combined tax rate does not exceed the constitutional limitation and there is no necessity to apportion the taxes. On the other hand, should the township estimate require a tax levy of twenty cents (the statutory maximum) and should the county estimate require a tax levy of forty cents, then the combined rate would be in excess of the constitutional maximum. In that event, as the combined rate cannot exceed the constitutional maximum of fifty cents, it would be necessary to apportion the taxes. The township organization would actually receive twenty per cent of the fifty cents or ten cents per one hundred dollar valuation.

A favorable vote to increase the tax rate under the provisions of Section 137.065, supra, actually raises the statutory and constitutional limit to the rate approved by the voters.

We assume that by the term "increase" you refer to the difference between the fifty cent maximum (in counties having an assessed valuation of less than \$300,000,000) and the rate approved by the voters. If this assumption is correct, then we are of the opinion that the "increase" does not enter into the problem of apportionment.

If the tax rate approved by the voters is equal to the combined total of the tax rate required by the township and county then the tax rate for county purposes would not exceed the constitutional maximum as authorized by the voters and there would be no necessity for apportionment. For example, if the tax rate required by the

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township estimate is twenty cents and the tax rate required by the county estimate is forty cents and the voters approve a tax rate of sixty cents, the tax rate for each organization would be that which was required by the estimates. In the foregoing example there is an "increase" but no apportionment is required.

On the other hand, if the tax rate approved by the voters exceeds fifty cents per one hundred dollars valuation but is not equal to the combined tax rate required by the township estimate and the county estimate, then the constitutional limit, as increased, would be exceeded and it would be necessary to apportion the taxes as provided in Section 137.070, supra. In the example used hereinabove, had the voters approved a fifty-five cent tax rate instead of a sixty cent rate, then it would be necessary to apportion the taxes even though there had been an "increase" of five cents. In this instance the fifty-five cent rate would be levied and then the taxes would be apportioned as provided in Section 137.070, supra.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) The territory comprising the Blackbird Special Road District, upon the dissolution of said special road district, did not assume the same status it had before the incorporation of Blackbird Special Road District. Instead it became unorganized territory and, as such, the property located therein is not subject to the special tax levy authorized by the voters of the Lincoln Township General Road District.

(2) Paragraph 2 of Section 137.065, RSMo 1949, authorizes the county court, upon its own motion, to submit, at a special or regular election, a proposition to increase the tax rate. If a petition containing the signatures of at least ten per cent of the qualified voters of the county is filed with the county court that a proposition to increase the tax rate be submitted to a vote, then it is mandatory that they do so.

(3) If the tax rate approved by the voters under the provisions of Section 137.065, RSMo 1949, is equal to the combined rate for both the county and township organizations (based upon the estimate of the township board of trustees and the county court), then the apportionment provisions of Section 137.070, RSMo 1949, is not applicable. However, if the tax rate approved by the voters is less than the combined tax rate for both the county and township organization

Honorable William Y. Frick

then the apportionment provision of Section 137.070, supra, would be applicable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

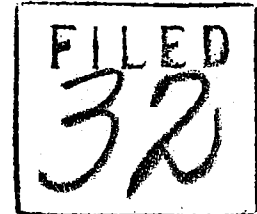
Very truly yours,

JOHN M. DALTON
Attorney General

CKH/mlw

STATE BOARD OF NURSING: Students regularly enrolled in accredited schools of professional nursing may be employed to perform professional nursing duties during vacation periods, days off, holidays and weekends.

March 4, 1959



Miss Catherine P. Geuss, R.N.
Executive Secretary
State Board of Nursing
State Capitol Building
Jefferson City, Missouri

Dear Miss Geuss:

Reference is made to your request for an official opinion, which request reads as follows:

"The Missouri Board of Nursing wishes an interpretation of the Nurse Practice Act, Chapter 335 - Sections 335.010 to 335.170 R.S. Mo. 1949 Repealed L 1953 S.B. 165 (Cumulative Supplement 1955), as it relates to the employment of students in Schools of Professional Nursing prior to completion of their program and licensure.

"Student nurses in Schools of Nursing wish to work in Hospitals giving nursing care to patients, during vacation, days off, holidays and week-ends, and would be paid by the Hospitals on an hourly basis. This request for employment has been prompted by shortage in securing sufficient licensed professional nurses and the need for some students to secure additional funds while in the School."

We understand from conversations with you that the question which you wish answered is whether "student" nurses regularly enrolled in accredited schools of nursing can be employed to perform professional nursing duties during vacation periods, days off, holidays and weekends.

Section 335.010, RSMo Cum. Supp. 1957, defines the practice of professional nursing as follows:

"2. A person practices professional nursing who for compensation or personal profit performs, under the supervision and direction

Miss Catherine P. Gouss, R.N.

of a practitioner authorized to sign birth and death certificates, any professional services requiring the application of principles of the biological, physical or social sciences and nursing skills in the care of the sick, in the prevention of disease or in the conservation of health."

Section 335.020 prohibits the practice of registered professional nursing without a license in the following language:

"It is unlawful for any person to practice or to offer to practice registered professional nursing or licensed practical nursing in this state for compensation or personal profit, or to use any title, sign, abbreviation, cards, or device to indicate that such person is practicing registered professional nursing or licensed practical nursing unless he has been duly licensed under this chapter."

Certain exceptions to the prohibition contained in Section 335.020 are created by Section 335.030. Said section reads in part as follows:

"No provision of this law shall be construed as prohibiting practical nursing so long as the parties so practicing do not hold themselves out to be licensed practical nurses; nor as prohibiting the service rendered by technicians, attendants, nurses aides, ward helpers or other auxiliary workers employed in hospitals, state or private; nor shall it apply to any person nursing the sick for hire who does not in any way assume the title of 'licensed practical nurse,' or 'obstetrical nurse,' or use the abbreviation 'L.P.N.,' and 'O.N.' No provision of this law shall be construed as prohibiting nursing care by friends or members of the family; nor as prohibiting the incidental care of the sick by domestic servants or persons primarily employed as housekeepers; nor as prohibiting nursing assistance in the case of emergency; nor shall it be construed as prohibiting the practice of nursing by students enrolled in accredited schools of professional nursing or in schools of practical nursing, nor by graduates of such schools or courses pending the results of the

Miss Catherine P. Geuss, R.N.

first licensing examination scheduled by the Board following such graduation; * * *"
(Emphasis supplied.)

We note that the provisions of Chapter 335 are not to be construed as prohibiting the practice of nursing by students enrolled in accredited schools of professional nursing. As noted in Section 335.010, supra, one of the requisites to the practice of professional nursing is that it shall be done for compensation or personal profit. In view of such fact, we do not believe that the exemption is limited to practice as a part of the curriculum of the school but is, in fact, broad enough to extend to the practice of professional nursing for compensation under circumstances such as you have described.

We wish to point out, however, that whereas we are of the opinion that students in accredited schools can undertake duties which would be included within the definition of the practice of professional nursing, such would not permit said students to use any title, sign, abbreviation, card or device to indicate that such person is practicing registered professional nursing.

CONCLUSION

Therefore, it is the opinion of this office that students regularly enrolled in accredited schools of professional nursing may be employed to perform professional nursing duties during vacation periods, days off, holidays and weekends.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

INCOME TAX:

VENUE:

FAILURE TO FILE REPORTS:

An income tax return is required to be filed either at a branch office of the Revenue Department or at the main office and that venue of the crime of failure to file can be properly laid in the county wherein a branch office is located or in Cole County.

December 30, 1959



Honorable William J. Geekie
Prosecuting Attorney
City of St. Louis
Municipal Courts Building
14th and Market Streets
St. Louis, Missouri

Dear Mr. Geekie:

You recently asked us for an opinion as follows:

"We have recently been requested to prosecute several residents of the State of Illinois for failure to make and file Income Tax Returns on earnings had in this state. We are dubious of the venue for such action and request your opinion.

"We have a copy of your opinion to Mr. L. A. Haake dated November 6, 1959, wherein you conclude that an 'Illinois resident who is employed in Missouri and required under Missouri law to file a Missouri income tax return-----may be prosecuted where the report was required to be filed.' Our question is, where are income tax returns by non residents required to be filed?"

The specific question you ask is: "Where are income tax returns by non-residents required to be filed?" Further conversation with you, however, indicated that your actual concern was as to venue for the criminal action of failure to file an income tax return.

We stated in an opinion dated November 16, 1959, written to Honorable L. A. Haake, Supervisor of the Income Tax Department, that an Illinois resident who is required by law to file

Honorable William J. Geekie

a Missouri income tax return and who willfully fails to do so is guilty of a misdemeanor and may be prosecuted where the report was required to be filed.

Section 143.210, RSMo 1949, allows the Director of Revenue to set up branch offices. It reads, in part, as follows:

"* * * Returns by persons residing within this state and who are under a duty to file a return, and returns by persons residing without the state and deriving income from sources within the state and within its jurisdiction may be made to any of such branch offices * * * or to the main office of the state department of revenue; * * *."

The Director has set up a branch office in St. Louis and at other locations throughout the state. Returns which are required to be filed could be properly filed at any of these branches.

The answer to your first question, then, is that tax returns of non-residents are required to be filed in either a branch office or in the main office at Jefferson City.

In 1957 the Legislature passed Section 541.035 dealing with venue in cases where a report was not filed as required by law. It reads as follows:

"Offenses for failure or refusal to comply with any law requiring a report to be filed or made in or to the state of Missouri, or any department or officer thereof, shall be held to be committed in the county of the residence of the person failing or refusing to file or make such report, except where the person shall reside without the state of Missouri, in which event the unlawful act is deemed to have been committed in the county wherein the report is required by law to be filed."

It would appear that this crime could be prosecuted in any place where the report could have properly been filed. A similar situation arose in *United States v. Commerford*, 64 F.2d 28. The defendant in that case resided in an eastern district of New York

Honorable William J. Geekie

and had a business place in the southern district of New York. He failed to file a Federal income tax return which could have been filed either in the eastern or southern district. The defendant took the position that this offense had only one venue and that the government must prove in which district the offense occurred. He relied, in part, on the Sixth Amendment of the Constitution of the United States that allows a defendant the right to a speedy and public trial by an impartial jury of the state and district wherein the crime is committed. The Missouri Constitution, Article I, Section 18a, affords a similar safeguard in that it allows a defendant a speedy public trial by an impartial jury of the county. The court in that case, l.c. 33, said as follows:

" * * * But filing a return in either district discharges the taxpayer's complete duty in both districts. Equally a failure to make a return in either district is an offense in both districts, and the offender may be tried in either district. The objection that this would permit a taxpayer to be tried twice for what is, in substance, one offense, is erroneous. We do not say that the taxpayer owes two duties to file a return or that failure to make a return constitutes two separate offenses. There is but one duty to make a return, and failure constitutes but one offense, and that duty exists and the offense occurs in two districts. This view is supported by the Supreme Court in *Haas v. Henkel*, 216 U. S. 462, 474, 30 S. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112. There a statute was construed as meaning that the crime was to be considered as committed in both districts, and the court said this presented no difficulty, since the government must then elect to try the accused in one district or the other."

A similar situation was taken up in New York in *People v. Colbert*, 31 N.Y.S. 2d 246. Their law required a filing of an income tax return in any one of a number of district offices or at the state capitol. The defendant maintained that venue to hear the case was only in the state capitol. The court, in conclusion, l.c. 253, said as follows:

" * * * As the law now stands it affords the taxpayer an opportunity to make a return and pay a tax in any one of seven counties. Violation of his duty would seem to impose liability of prosecution in any of these counties."

Honorable William J. Geekie

CONCLUSION.

Therefore, it is our opinion that an income tax return is required to be filed either at a branch office of the Revenue Department or at the main office and that venue of the crime of failure to file can be properly laid in the county wherein a branch office is located or in Cole County.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

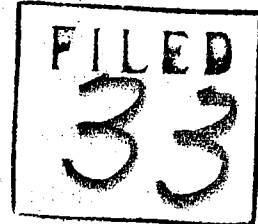
JOHN M. DALTON
Attorney General

JEG:mc

WORKMEN'S COMPENSATION:
PROCEDURAL LAW:
STATEMENTS:

Section 287.215, V.A.M.S., June Pamphlet 1959, passed by the 70th General Assembly of the State of Missouri, is procedural law, and may apply to the procedures in causes of action which arose prior to the effective date of this section.

September 16, 1959



Honorable Spencer H. Givens
Director, Division of
Workmen's Compensation
State Office Building
Jefferson City, Missouri

Dear Mr. Givens:

This is in response to your letter of September 2, 1959, which we quote:

"Will you please advise us in an opinion on the following:

"Included in Senate Bill No. 167, passed by the Seventieth General Assembly and approved by the Governor, is Section 287.215, a new provision of the law that became effective on August 29, 1959.

"Will you please advise us whether or not the provisions of this section are procedural or substantive, that is to say, will these new provisions apply to accidental injuries occurring before August 29, 1959, or will they apply only to those occurring after August 28, 1959?"

Section 287.215, V.A.M.S., June Pamphlet 1959, passed by the 70th General Assembly of the State of Missouri:

"No statement in writing made or given by an injured employee, whether signed or unsigned, or whether taken and transcribed by a stenographer, signed or unsigned by the injured employee, shall be admissible in evidence, used or referred to in any

Honorable Spencer H. Givens

manner at any hearing or action to recover benefits under this law unless a copy thereof shall be given or furnished the employee or his dependents in case of death, or their attorney, within seven days after written request for same by the injured employee, his dependents in case of death, or by their attorney."

In the case of *Ambrose v. State Department of Public Health and Welfare*, 319 S.W. 2d 271 (December, 1958), the Kansas City Court of Appeals stated, at page 274:

"'Substantive law' is a term that frequently has been defined and contrasted with procedural or adjective law. An accepted definition is that substantive law is law which creates, defines and regulates rights as opposed to adjective law which pertains to and prescribes the practice, method, procedure or legal machinery by which substantive law is enforced or made effective. See *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W. 2d 371, 378; *Maurizi v. Western Coal and Mining Co.*, 321 Mo. 378, 11 S.W. 2d 268, 272."

Division No. 1 of the Supreme Court of Missouri, 1937, in the case of *Barker v. St. Louis County*, 104 S.W. 2d 371, stated, at page 377:

"Adjective or procedural law is a 'method provided by law for aiding and protecting defined legal rights, procedure, the law which prescribes the method of enforcing rights or obtaining redress for their invasion.' 1 C.J., p. 1197. 'Substantive law is that part of the law, which creates, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.' 36 C.J. p. 963; *Maurizi v. Western Coal & Mining Co.*, 321 Mo. 378, 11 S.W. (2d) 268, loc. cit. 272. The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying

Honorable Spencer H. Givens

on the suit.' Jones v. Erie R. Co., 106
Ohio St. 408, 140 N.E. 366, 368."

Considering the definition as set forth in the preceding two cases, it is the opinion of this office that Section 287.215, supra, is procedural law. It is to be noted from this section that the machinery for carrying on the suit is involved. It provides that a statement shall not be admissible unless a copy thereof has been submitted to the employee or his attorney within seven days of a request in writing therefor. We believe that this is a "method provided by law for aiding and protecting defined legal rights, procedure." There would appear to be no basis for a claim or right set forth in Section 287.215, it being merely a procedural law.

As it has been stated in 82 C.J.S., Section 422, unless an intent to the contrary is expressed (none being shown in Section 287.215, supra), a statute providing or merely affecting the remedy may apply to, and operate on, causes of action which had accrued and were existing at the time of the enactment of the statute, as well as causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment; and also unless an intent to the contrary is expressed, such enactments as do not affect the nature of the remedy, but relate solely to incidents of procedure, are applicable to all proceedings taken in pending actions from the time they take effect.

We think this adequately sets forth the law as it is in Missouri, and upon this basis it would be our opinion that Section 287.215, supra, may apply to the procedures in causes of action which have arisen prior to the effective date of this section, but its application will not apply to those cases in which a final decision has been rendered prior to August 29, 1959.

CONCLUSION

It is the opinion of this office that Section 287.215, V.A.M.S., June Pamphlet 1959, passed by the 70th General Assembly of the State of Missouri, is procedural law, and may apply to the procedures in causes of action which arose prior to the effective date of this section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

RECORDER OF DEEDS: Recorder in fourth class counties still receives compensation for performance of duties with respect to veterans' discharges

November 11, 1959



Honorable J. Allen Gibson
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Gibson:

We have received your request for an opinion of this office, which reads as follows:

"I would appreciate very much having your valuable opinion as to the following matter concerning the compensation of the Circuit Clerk's and Recorder's of these fourth class counties.

"Section 483.371, Mo. RS 1957 Supp, provides that for the performance of their duties required by Section 59.505, Mo. RS 1957 Supp, such clerk shall receive the sum of \$300.00.

"Senate Bill No. 70, repeals Section 59.505, Mo. RS 1957 Supp, and enacts a new section in lieu thereof, No. 59.490, which provides that for the performance of their duties, such clerk shall receive the sum of Fifty Cents (50¢), to be paid by the county treasury.

"The duties required of the Clerk in Section 59.490 are the same as the duties required of the Clerk by Section 59.505.

"Does this new Section 59.490, Senate Bill No. 70, repeal Section 483.371, Mo. RS 1957 Supp, which give the Clerk \$300.00; or is

Honorable J. Allen Gibson

the Clerk in Fourth Class counties still entitled to compensation under Section 483.371, which Section was not repealed by said Senate Bill No. 70?"

Sections 39.505 and 483.371, RSMo, 1957 Cum. Supp., originated in Senate Bill No. 166 of the 67th General Assembly, Laws of Missouri, 1953, page 373. As originally enacted, the provisions read as follows:

"1. The circuit clerk and recorder in counties of the fourth class, wherein the offices shall have been combined, as the recorder of the county, shall in addition to other duties imposed upon him by law, have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the armed forces of the United States, which list shall show such veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the armed forces of the United States one certified copy of such discharge upon request of such veteran, or if such veteran shall have deceased since the recording thereof, then by his heir, executor or administrator. A veteran shall be deemed a resident of the county for the purposes of this section if he shall have resided in the county prior to his induction into the armed forces, and shall have returned there upon his discharge, or if he shall have resided in the county for more than ninety days next prior to the recording of such discharge with the intention of making the county his domicile.

Honorable J. Allen Gibson

"2. For the performance of the duties required by subsection 1 of this section the circuit clerk and recorder in counties of class four shall receive the sum of three hundred dollars annually."

In the preparation of the 1953 Cumulative Supplement to the Revised Statutes of Missouri, the revisor numbered Section 1 of Senate Bill No. 166 as Section 59.505 and Section 2 was numbered Section 483.371. In the compilation of the Cumulative Supplement, the revisor accordingly changed the reference, found in Section 2 of Senate Bill No. 166, to Section 1 of said act, to Section 59.505. Whether or not the revisor was authorized so to separate the provisions of Senate Bill No. 166 in the Cumulative Supplement and place them in separate remote sections of the publication may be of academic interest in view of the provisions of Section 3.060, RSMo, which would appear to authorize the transfer of sections only in the preparation of editions of the Revised Statutes. Nevertheless, the change was made in the Cumulative Supplement and the arrangement thereby effected became the basis for reference by the General Assembly in its recent changes in Chapter 59, to which your inquiry relates.

The enactment of the 70th General Assembly, concerning which you inquire, was made by Senate Bill No. 70. The bill was labeled "Revision" and presumably was drafted by the Legislative Research Committee in the performance of its duties with respect to the revision of statutes. The bill repealed Sections 59.020, 59.030, 59.040, 59.059, 59.060, 59.100, 59.280, 59.290, 59.490 and 59.500, RSMo 1949, and Sections 59.270 and 59.505, RSMo, 1957 Cum. Supp., and enacted in lieu thereof six new sections to be known as Sections 59.020, 59.040, 59.100, 59.270, 59.290 and 59.490. Its only provisions with which we are now concerned are repealed Sections 59.490, 59.500 and 59.505 and new Section 59.490.

In language practically identical with that found in Section 1 of the 1953 Act, above quoted, Section 59.490, RSMo 1949, imposed upon the recorder in third class counties the duty of preparing a list of discharged veterans. Section 59.500 made similar provision for third class counties wherein the office of circuit clerk and recorder had been combined. Under each of these provisions the recorder was entitled to receive from the county as a non-accountable fee the sum of fifty cents for each name added to the list.

Honorable J. Allen Gibson

Subparagraph 1 of Section 59.590 of Senate Bill No. 70 of the 70th General Assembly, in effect, combined the provisions of Sections 59.490, 59.500 and 59.505 into a single section, to be applied in all counties to which the former three sections applied. It made minor grammatical changes, but essentially the duty imposed remains as it existed under the three superseded provisions.

Subparagraph 2 of Section 59.490, as found in Senate Bill No. 70, reads as follows:

"2. For each name which the recorder or ex officio recorder appends to the alphabetical list, and for each certified copy of the discharge that he furnishes, he shall receive the sum of fifty cents, to be paid out of the county treasury. The fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in section 59.250 and shall not be deemed to be accountable fees within the meaning of section 59.260."

No reference is found in Senate Bill No. 70, or in any other enactment of the General Assembly, subsequent to its adoption, to what is now Section 483.371, RSMo, 1957 Cum. Supp.

The reason for the change here under consideration was set forth in the official printed copies of Senate Bill No. 70 as originally introduced and as perfected, as follows:

"Sections 59.490, 59.500 and 59.505, applicable respectively to recorders in third class counties, circuit clerks and ex officio recorders in third and fourth class counties, make identical provisions as to the recording of veterans' discharges except that in fourth class counties no fee is allowed the recorder. The sections are here consolidated in one section. The portions of section 59.490 and 59.500 which provide the fees for the third class county officers are consolidated in subsection two of the new section. The other sections are repealed."

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This explanation was presumably the work of the Legislative Research Committee. Although the statement that the sections referred to allowed no fees to recorders in fourth class counties was technically correct, nevertheless, the statement wholly failed to refer in any manner to the provisions of Section 483.731, which provided the compensation for the recorder in fourth class counties for the performance of such duties.

This explanation makes obvious the fact that the legislation here in question was never intended to reduce the compensation of the recorders in fourth class counties, but was presented to the General Assembly as providing them compensation where none was previously authorized. However, in construing statutes, one must assume that the General Assembly was familiar with existing laws on the subject of their enactments. *Smith v. Pettis County*, 345 Mo. 839, 136 SW2d 282. Therefore, if Senate Bill No. 70 actually had, under any recognized rules of statutory construction and application or under its express language, the effect of nullifying or abrogating the provisions of Section 483.371, such effect must be given it, even though it might have been enacted under the influence of a misleading statement concerning its effect. Where the language of a statute is clear and unambiguous, a court has no right to read into it a legislative intent contrary to that made evident by the phraseology employed. *State ex inf. Rice v. Hawk*, 360 Mo. 490, 228 SW2d 785.

As above mentioned, Section 483.371 is nowhere referred to in Senate Bill No. 70, or in any other enactment, so there is no question of its express repeal. Repeals by implication are, of course, not favored, and, for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand. *State ex rel. Peck v. Brown*, 340 Mo. 1189, 105 SW2d 909. Obviously there is no such irreconcilable conflict between subparagraph 2 of Section 59.490 of Senate Bill No. 70 and Section 483.371 as to call for the repeal by implication of the latter.

The only basis which exists for asserting that the provisions of Section 483.371 are no longer effective must lie in the fact that, in authorizing the compensation therein provided, such section now refers to "the duties required by section 59.505." The argument would be that Section 59.505 having been repealed, provision for the duty for which the compensation was provided no longer existed and, therefore, the compensation could not be paid. However, this argument appears to us to

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give undue emphasis to the reference in Section 483.371 to the number given to Section 59.505 and to ignore the fact that, although the section is not now so numbered, the duty imposed remains identical with that which existed under Section 59.505. We find no legal reason which requires that the numbering of a statute must be given precedence over its substance. Numbering is, of course, no part of the substance of the statute. The Legislature did not enact Section 483.371 with a reference to Section 59.505. That change was the act of the revisor of statutes. That numbering is a mere ministerial function which must not be given effect over substance appears from Section 3.060, RSMo, wherein the Legislative Research Committee, in preparing editions to the statutes, is authorized to renumber sections and parts of sections, rearrange sections, change reference numbers, and to transfer, divide or combine sections so as to give to distinct subject matters a section number.

In the present situation, the Legislature has imposed a particular duty upon the recorder of deeds in fourth class counties and has authorized compensation to him for the performance of such duty. With the enactment of Senate Bill No. 70, the identical duty is continued and the compensation statute likewise remains.

Section 1.120, RSMo, provides:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

Insofar as Senate Bill No. 70 refers to the duties of the recorder in fourth class counties, it is a continuation of the prior act, not a new enactment. The fact that it now appears under a different section number does not make it otherwise.

As above set forth, Senate Bill No. 70, by its terms, now provides in fourth class counties the fifty cent fee for the recorder as is given in third class counties. It is our opinion that this provision must be given effect, but, inasmuch as Senate Bill No. 70 imposes no new or additional duty upon recorders in fourth class counties, such officials may not, under the provisions of Section 13 of Article VII of the Constitution of Missouri, 1945, receive such additional compensation during their current term of office.

Honorable J. Allen Gibson

CONCLUSION

Therefore, it is the opinion of this office that the provisions of Section 483.371, RSMo, 1957 Cum. Supp., compensating the circuit clerk and ex officio recorder of deeds in fourth class counties for the performance of duties relating to the preparation of a list of discharged veterans and the recording of veterans' discharges, are not abrogated by the repeal of Section 59.505, RSMo, 1957 Cum. Supp., by Senate Bill No. 70 of the 70th General Assembly and said Section 483.371 remains in effect.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

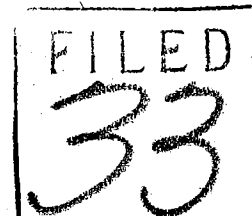
JOHN M. DALTON
Attorney General

RRW:ml

COUNTY HOSPITAL TRUSTEES: The order of the County Court of Texas County made on February 16, 1959, appointing trustees to the Texas
TERMS OF OFFICE: County Hospital was a valid order; the limitation to January, 1960, which was a part of the order, was contrary to law and so was invalid. The appointments actually extend until the next general election following February 11, 1959. For the reasons given above, the County Court would not be empowered to appoint new trustees in January, 1960. The County Court has no power of removal of these trustees prior to the time of the termination of their appointments, and a successor or anyone or all of them can only be appointed by the County Court when there is a vacancy on the board of trustees.

November 16, 1959

Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri



Dear Mr. Gladden:

Your recent request for an official opinion reads:

"I respectfully request an opinion from your office on the following question:

"The County of Texas has established and is now maintaining a county hospital in accordance with the provisions set forth in Chapter 205, V.A.M.S. 1949. In accordance with Section 205.170, V.A.M.S. 1949, the County Court did appoint five trustees on September 21, 1956. Thereafter the same trustees were re-appointed by the County Court on February 11, 1957, for the reason that no person filed for the office of trustee as provided for in order to be voted upon at the general election held in November, 1956. The next general election was in November 1958, and again no one filed an announcement of candidacy for the position of trustee of the county hospital. Thereafter on February 16, 1959, the County Court made an order appointing the same men that had served as trustees previously to serve as trustees of the county hospital until January, 1960.

"Question: 1. Is the order of appointment made by the County Court on February 16, 1959, appointing persons to serve until January, 1960, a valid order on the part of the County Court inasmuch as it does not provide that the persons shall serve until the next general election?

Honorable William E. Gladden

"2. If it is a valid order, would the County Court be empowered to appoint new trustees in January, 1960?

"3. If the order appointing trustees to serve until January, 1960, is determined to be valid and if it is found that such trustees will serve until the general election in 1960, contrary to the wording of the court order, then in view of the fact that the trustees were appointed by the County Court rather than elected, on what basis could the County Court remove any one or more of the trustees, i.e., do the trustees serve at the pleasure of the County Court or must there be some specific cause for removal of the trustees by the County Court that appointed same?"

We assume that the appointments of September 21, 1956, were valid. You state that they were in accordance with Section 205.170, V.A.M.S. We also assume that these appointments were until the next following general election inasmuch as numbered paragraph (2) of Section 205.170, supra, states that trustees so appointed "shall hold their offices until the next following general election" and since you state that the appointments were in accordance with Section 205.170.

You next state that on February 11, 1957, the county court reappointed the same trustees for the reason that no person filed for the office. This the county court was authorized to do by numbered paragraph (1), Section 205.180, which reads:

"(1) Each candidate for the office of hospital trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. Such announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any such announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary to fill all vacancies on the board which result from

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the expiration of the term of any trustee or trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term."

We assume also, since you do not state to the contrary, that these appointments were until the next general election.

The next following general election was in November, 1958, and you state that once more no one filed for the positions of trustees, and that on February 16, 1959, the county court made an order appointing the same men who had served as trustees "to serve as trustees of the county hospital until January, 1960," instead of appointing these men "until the next following general election," as had been done in 1956 and 1957.

Your first question is whether this order of appointment made on February 16, 1959, was a valid order because it did not provide that the persons so appointed should serve until the next general election, but, for some reason which does not appear, the order made the term only until January, 1960.

Certainly the county court would have the right on February 16, 1959, to appoint trustees on the basis of numbered paragraph (1) of Section 205.180 set forth above. Therefore, the appointments made on that date were valid appointments. But the limitation imposed, to wit, "until January, 1960," was not a valid limitation because the law as set forth above states that such appointment shall be "until the next general election."

It is our belief that the limitation portion of the appointment made on February 16, 1959, was invalid because it is not in harmony with the law, and that, being invalid, it was of no force and effect but that it did not invalidate the appointment and that, being invalid, the limitation will not hold and that instead of ending in January, 1960, the appointments will go on until the next general election.

In view of our answer to your first question, your second question is automatically answered in the negative.

Your third question is predicated upon the assumption which we have reached above that the order of February 16, 1959, was valid but that the trustees so appointed will serve until the

Honorable William E. Gladden

general election in 1960, then would the fact that the trustees were appointed by the county court rather than elected by the voters afford any basis for the county court to remove any one or more of the trustees? In this regard, we direct attention to numbered paragraph 4 of Section 205.170 which reads:

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor."

We find no law other than the above bearing upon this matter, and we do not see that the above law vests in the county court any power of removal, regardless of whether the trustees held their positions by election or by appointment. All of the authority that is vested in the county court in this regard is to fill a vacancy on the board if such vacancy occurs.

In the instant situation it would seem to be clear that there is no vacancy on the board. Indeed, your query is whether or not the county court can create one or more vacancies by dismissing, at its pleasure, one or more or all of the board members. We assume that if the full number of members were not on the board the county court would not, through you, have wanted an answer to this question.

The county court is given the power to fill a vacancy on the board if a vacancy is created "by removal, resignation, or otherwise"

In the case of the State vs. Police Commissioners, 14 Mo. App. 297 at l.c. 302, the St. Louis Court of Appeals stated:

"It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint. If the law provides a term for the incumbency, this will supersede the incidental power of removal during the continuance of the term. * * *" (Emphasis ours.)

Honorable William E. Gladden

CONCLUSION

It is the opinion of this department that the order of the County Court of Texas County made on February 16, 1959, appointing trustees to the Texas County Hospital was a valid order; that the limitation to January, 1960, which was a part of the order, was contrary to law and so was invalid, and that the appointments actually extend until the next general election following February 11, 1959.

It is the further opinion of this department that for the reasons given above the county court would not be empowered to appoint new trustees in January, 1960.

It is the further opinion of this department that the county court has no power of removal of these trustees prior to the time of the termination of their appointments, and that a successor or any one or all of them can only be appointed by the county court when there is a vacancy on the board of trustees.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

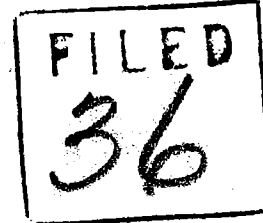
John M. Dalton
Attorney General

HPW:ar/om

CORPORATIONS:
INCOME APPORTIONMENT:
INCOME TAX:
TAXATION:

Answers to six questions arising under
Section 143.040, RSMo 1949, relating to
corporate income apportionment.

April 7, 1959



Honorable L. A. Haake
Acting Supervisor
Income Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Haake:

You recently asked this office for an opinion on the
following situations:

"This office has before us the following
case:

"Taxpayer is a foreign corporation not
qualified to transact business in the
State of Missouri, and is engaged in the
manufacture (outside of Missouri) and
sale of products to both wholesale dis-
tributors and individual retail outlets.

"Taxpayer employs sales personnel, on a
salary-plus-bonus basis, who solicit
orders for taxpayer's product from dis-
tributors and retail outlets over a multi-
state area. Some of the salesmen who are
concerned with Missouri as a portion of
their sales territory reside in states
other than Missouri, and some of the sales-
men are Missouri residents who also solicit
orders in a multi-state area.

"Taxpayer's product is of such nature that
its correct use and application requires
some degree of technical knowledge and
skill which can best be obtained through
practical demonstration. For this reason,

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taxpayer leases, on a monthly basis, office space within Missouri which is used as a center to demonstrate the correct use of taxpayer's product. Taxpayer employs personnel, skilled in the use and application of taxpayer's product to operate this center and make the demonstrations, but no sales are made by these employees, no stock is maintained on hand for sale, (in fact the only stock located at the demonstration center has a value which at no time exceeds \$100.00, and which is kept solely for use in demonstrations) and no orders for taxpayer's product are solicited by such employees.

"Taxpayer does not maintain either at this center or anywhere else within Missouri, facilities for bookkeeping or for the processing, filing or transmission of orders or reports of the various salesmen who solicit orders for taxpayer's product within a territory which includes Missouri. All orders taken by taxpayer's salesmen (regardless of the extent or location of their territory) (a) are transmitted directly to the home office of the company (outside Missouri); (b) all such orders are accepted at the home office of the company; (c) all products shipped in response to such orders are shipped from the home office of the company directly to the customer; (d) all bookkeeping and billing is handled at the home office of the Company; and (e) all payments for products are mailed directly to and received at the home office of the company.

"Except for occasional inspection trips or for other trips of similar and impermanent nature, there are no executive personnel of the company within the State of Missouri."

* * * * *

"In view of the foregoing, it is respectfully requested that an official opinion be given in connection with the following questions:

"1. Under the facts hereinabove set forth,

Honorable L. A. Haake

is any transaction a "transaction wholly in this state" so as to require inclusion for Missouri income tax purposes of 100% of the net income resulting from such transaction?

"'2. Is an order solicited from a Missouri customer by a salesman of taxpayer, which is transmitted by the salesman directly to the taxpayer's office outside Missouri, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively), a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

"'3. Does the order of a Missouri customer mailed directly to taxpayer's home office by such customer, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively, without the intervention of any salesman), constitute a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

"'4. Is an order solicited from a customer outside Missouri by a salesman of taxpayer who is a Missouri resident, which is transmitted from the salesman's residence in Missouri directly to taxpayer's home office, outside Missouri, with the product being shipped, in response to such order, directly to the customer outside, Missouri, a transaction partially in this state and partially in another state or states so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

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"5. The circumstances are identical to 4 above, except that the order is transmitted to taxpayer's home office while the salesman is still outside Missouri.

"6. Would the answers to any of the questions set forth above be modified in any respect if the taxpayer qualified to transact business in the State of Missouri, and, if so, in what respect or respects?"

Section 143.040, RSMo 1949, subsection 1, reads in part as follows:

"1. Each year, at the times and in the manner, now or hereafter provided, a tax shall be levied upon, assessed against, collected from, and paid by every corporation, joint stock company, and joint stock association organized, authorized or existing under the laws of this state, and by every corporation, joint stock company and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, joint stock company or joint stock association, except such as may now or hereafter be exempted, and except corporations which operate a railroad line or lines, bus lines, truck lines, air lines and other forms of transportation extending from this state into another state or states over lines or routes owned, leased, or used, except corporations which operate a telephone line or lines extending from this state into another state or states, or a telegraph line or lines, extending from this state into another state or states, and except corporations whose only activity is the investment or reinvestment of its own funds in stocks, bonds, any other securities, real estate, leaseholds, annuities, and other interest in real estate, or holding stocks, bonds, other securities, real estate, leaseholds, annuities or any other interest in real estate, in such per cent, as now or hereafter provided of the net income from all sources in this state during the preceding year. Income shall include all gains,

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profits and revenue from the transactions of the business of the corporations in this state, including gains, profits and revenue from the doing in this state of such portions of each transaction of the business of the corporation which transaction is partly done in this state and partly done in another state or states, and all other income from sources in this state as income is otherwise defined. *****"

The remainder of subsection 1 deals with deductions. Subsection 2 deals with a formula for apportionment.

According to the factual situation given us, the company that we are dealing with is an out-of-state corporation maintaining no branch offices in Missouri but maintaining demonstration centers here. Sales are solicited in Missouri by salesmen, some of whom live in Missouri.

The Missouri Supreme Court took up a situation almost the exact converse of the situation you describe in Artophone Corporation v. Coale, 133 S.W. 2d 343, which was decided in 1939. There have been no changes in the basic provisions of this law since then, and this case has been cited with approval as late as 1955 in Green v. Missouri Tax Commission, 277 S.W. 2d 544.

In the Artophone case, the facts insofar as they are herein applicable are as follows: The taxpayer had his only place of business in Missouri. He distributed electrical appliances which he received from out of state. Some of the appliances were sold out of state by traveling salesmen working out of the Missouri office. They solicited orders subject to the approval of the Missouri office. Goods sold were shipped from the taxpayer's warehouse in Missouri. The state auditor ruled that all income of a domestic corporation having no branch office in another state was taxable in Missouri. The taxpayer, on his return, allocated the income from sales made out of state. The question presented was the propriety of this allocation. The court held that the allocation was proper and that the auditor's ruling that all income of a domestic corporation having no branch office was taxable was in error. The court in that case took a very broad view of the term "transaction" and at page 348, quoting from another case, said:

"* * * "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." * * * "

Honorable L. A. Haake

The court has also had an opportunity to pass on the propriety of newspapers allocating their income in the case of *In re Kansas City Star Co.*, 142 S.W. 2d 1029. The court held such allocation proper and said, 1.c. 1037, as follows:

"Arguing further from principle and texts and decisions construing the Federal income tax law and statutes of other states, appellants say the source of the income is determined by the nature and location of its producing cause. If it be from labor, the place where the labor was performed is decisive; if it be from capital the place where the capital was employed governs. The source is not merely the place where the income was captured by delivery of the finished product and collection of the proceeds. The question is, where was the income earned or produced. But, say appellants, when a business is 'unitary' the place where the business is carried on fixes the situs of the income, and things done elsewhere will be treated as 'incidental' -- especially when they were controlled or subject to confirmation in the taxing jurisdiction.

"We agree to the first part of this thesis, holding the source of the income is the place where it was produced, but cannot assent to the latter part making an exception when the business is unitary. * * *"

The court ruled in the case of *Burkhart v. Goale*, 139 S.W. 2d 502, that income from a Missouri corporation domesticated in several other states need not be allocated when a factory owned by this corporation and located in another state ships merchandise to purchasers in still another state. In this case the home office of the concern was in Missouri and the court held under the above facts that no income tax was due Missouri on the above-mentioned transactions. More recently in *A. P. Green v. Missouri State Tax Commission*, 277 S.W. 2d 544, the court held that income from trademarks, patents, and the like which Green allowed foreign corporations to use, the use being outside of Missouri, was not income in Missouri or as a result of a transaction partially within the state and partially outside the state and thus did not need to be allocated.

Honorable L. A. Haake

In the factual situation you describe, we feel that the court would hold the visit of the salesman so as to make the contact with the customer, sell him on the product and secure the business, the activities in demonstrating and the resultant orders, all a part of the transaction resulting in the income. It should be borne in mind, however, that under the law of sales some of the transactions would not be taxable as sales occurring in Missouri. We feel, however, that the court in the Artophone Corporation case draws a distinction between contracts, sales, and the broader term "transactions".

Now, for the answers to your specific questions:

"1. Under the facts hereinabove set forth, is any transaction a "transaction wholly in this state" so as to require inclusion for Missouri income tax purposes of 100% of the net income resulting from such transaction?"

We do not believe that any of the transactions mentioned are taxable as occurring wholly within the state.

"2. Is an order solicited from a Missouri customer by a salesman of taxpayer, which is transmitted by the salesman directly to the taxpayer's office outside Missouri, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively), a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?"

We feel that this transaction is one partially within Missouri and partially in another state and, therefore, requires income apportionment.

"3. Does the order of a Missouri customer mailed directly to taxpayer's home office by such customer, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively, without the intervention of any salesman),

Honorable L. A. Haake

constitute a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?"

Certainly, from the facts presented, the buyer of the product would have probably availed himself of a free demonstration of the product before ordering and in the usual case the original order would normally be solicited by personnel in Missouri. If this were true and the business in mind is actually a re-order situation, it is then without doubt a part of the original transaction. In case of an unsolicited order from a person who had received no demonstration, the question is somewhat more difficult. We feel, however, even in that situation the court would hold the order of the customer as a part of the transaction within the meaning of this law and require income apportionment.

"4. Is an order solicited from a customer outside Missouri by a salesman of taxpayer who is a Missouri resident, which is transmitted from the salesman's residence in Missouri directly to taxpayer's home office, outside Missouri, with the product being shipped, in response to such order, directly to the customer outside, Missouri, a transaction partially in this state and partially in another state or states so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?"

We feel that the answer to question four is no. The residence of the salesman and the use of a mailbox or some other means in Missouri to transmit the order to the home office is not sufficient to bring this transaction within the provisions of the statute requiring apportionment.

"5. The circumstances are identical to 4 above, except that the order is transmitted to taxpayer's home office while the salesman is still outside Missouri."

The answer to question four explains why this question must also be answered no.

"6. Would the answers to any of the questions set forth above be modified in

Honorable L. A. Haake

any respect if the taxpayer qualified to transact business in the State of Missouri, and, if so, in what respect or respects?"

The State purports to tax corporations licensed to do business in Missouri or doing business in Missouri. We feel that the corporation is taxable as to its income in either instance.

CONCLUSION

It is the opinion of this office that in instances where a part of the transaction resulting in income to a corporation doing business in Missouri is within the state and a part outside of Missouri, that income is taxable on an apportioned basis in Missouri and that transaction as used in this statute has a broad meaning that may include many occurrences depending not so much upon the immediateness of their connection as upon their logical relationship.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON
Attorney General

JEC:mc

TAXATION:
INCOME TAX:
REGULATED INVESTMENT
COMPANIES:

The option to receive cash dividend or have dividends reinvested in additional stock is income within the meaning of Section 143.100, RSMo 1949.

April 27, 1959



Honorable L. Haake, Acting Supervisor
Income Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Haake:

This is in reply to your inquiry of March 24, 1959, requesting an opinion on the taxability of optional dividends due shareholders of regulated investment companies. We have phrased your question as follows:

When a shareholder of shares in a regulated investment company has the option of receiving a cash dividend or having the amount of the dividend reinvested and receiving in return additional shares of the same company, is this income to the shareholder within the contemplation of the Missouri statutes governing the taxation of income?

Income is defined by Section 143.100, RSMo 1949. Portions of that statute applicable to the questions to be decided are quoted as follows:

"1. Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or the use of any interest in real or personal property. In any case where real or personal property has been held for more than six months only fifty per cent of the gain or loss resulting from sale

Honorable L. Haake

or exchange shall be taken into account in computing net income, but in such cases any loss used in computing the net income shall not exceed one thousand dollars over and above gains for the same period.

"2. Income shall also include interest, rent, dividends, securities and gains, profits and earnings from any other transactions of any business carried on for gain or profit; and from any sources whatever; income shall also include the shares of each person in the undistributed profits and earnings of partnerships, and the share of each stockholder in the undistributed profits and earnings of corporations, joint stock companies, or joint stock associations whose income is not exempted and against whose income there is no provision for a tax."

The portion underscored will be further construed and discussed infra. Note that this section includes both "dividends" and "securities and gains" which would include either cash or dividends which the taxpayer elected to have reinvested in stock. Therefore, it remains only for us to decide whether this right to receive cash or additional investment is "income" within the meaning of this section.

In considering taxability of dividends reinvested in stock of regulated investment companies, it is evident first, that they do not come within any of the classes of tax exempt organizations listed in Section 143.120, RSMo 1949. Likewise, such a dividend does not come within the exceptions to inclusion in a taxpayer's income enumerated in Section 143.150, RSMo 1949, nor is it a deduction from gross income, as set forth in Section 143.160, RSMo 1949. Since it does not appear to be a part of those things which our legislature has seen fit to exclude from income, we next pass to the question of whether it fits within the category of income as defined by Section 143.100, RSMo 1949.

The phrase concerning income, underscored in Section 143.100, RSMo 1949, quoted supra, which reads "from any sources whatsoever," is analogous to Section 61 of the 1954 Internal Revenue Code, as found in Title 26 U. S. C. A., which reads in part "gross income means all income from whatever

Honorable L. Haake

source derived." (Again the underscored emphasis is ours)

Under the Federal statute, it has been said by the United States Supreme Court, speaking through Mr. Justice Stone, in *Harrison v. Shaffner*, 312 U.S. 579, 580, 61 S.Ct. 757, 760, 85 L.Ed. 1055, 1. c. 580 [312 U.S.]:

"Decision in these cases was rested on the principle that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach of the statute taxing income 'derived from any source whatever.' "

Likewise, Mr. Justice Holmes said in *Corliss v. Bowers*, *Collector of Internal Revenue*, 281 U. S. 376, page 378:

"But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed - the actual benefit for which the tax is paid. * * *

So, also, the question of anticipatory assignment of income as income to a donor was covered in *Helvering v. Horst*, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75, 131 A.L.R. 655. Mr. Justice Stone said in that case, 311 U.S., at pages 115 and 116:

"In the ordinary case the taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued. But the rule that income is not taxable until realized has never been taken to mean that the taxpayer, even on the cash receipts basis, who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor. The rule, founded on administrative convenience, is only one of postponement of the tax to the final

Honorable L. Haake

event of enjoyment of the income, usually the receipt of it by the taxpayer, and not one of exemption from taxation where the enjoyment is consummated by some event other than the taxpayer's personal receipt of money or property. Cf. Aluminum Castings Co. v. Rentsch, 282 U.S. 92, 98. This may occur when he has made such use or disposition of his power to receive or control the income as to procure in its place other satisfactions which are of economic worth. * * *

The principle set forth in these cases is the rule of "constructive receipt" of income. An excellent explanation of this principle is found in 2 Mertens, the law of Federal Income Taxation, Section 10.01, at page 1. We quote:

"The individual taxpayer usually thinks in terms of actual receipts and outgo, and accordingly ordinarily reports his income on a cash receipts and disbursements basis. Such a simple concept of net income proved unacceptable, however, because it left with the taxpayer the power to determine the time when items became income.

"There was an obvious necessity to implement the doctrine of actual receipt with the theory of constructive receipt as a test of realization of income. Such a measure of tax liability is not unreasonable in principle. A taxpayer may not deliberately turn his back on income and thus select the year in which he will report it. A failure to recognize constructive receipt of income as income realized would open the door to avoidance and possible evasion. A taxpayer should not have the right to select the year in which to reduce income to possession. It is now well settled that income which is subject to a taxpayer's unfettered command and which he is free to enjoy at his own option is taxed to him as his income whether he sees fit to enjoy it or not.

Honorable L. Haake

"It will be seen from the foregoing that the theory of constructive receipt is properly applicable to those situations involving the question as to when income is received. It should be limited to this primary use, that is, to determine whether a person should be taxed on an item of income which, although not yet physically received, is within his unconditional capacity to reduce to possession. * * *"

Clearly, the right to either receive income or have it reinvested would be income "to the taxpayer" within the meaning of this doctrine and Section 143.100, RSMo 1949.

Dividends of regulated investment companies are now specifically covered by the Federal Internal Revenue Code of 1954 as to federal taxation. See Title 26 U.S.C.A., Sections 851 - 855. See also the Income Tax Regulations for 1959, Section 1.851 and sections immediately following.

CONCLUSION.

Therefore, it is the conclusion of this office that where a shareholder in a regulated investment company has the option of receiving a cash dividend or having a dividend reinvested, receiving in return additional stock of the investment company, it results in a benefit to him which is income within the meaning of Section 143.100, RSMo 1949, defining income.

Very truly yours,

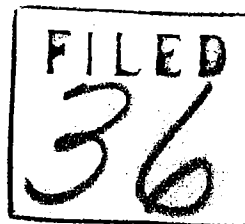
John M. Dalton
Attorney General

JBB:ld;lc

DEDUCTIONS:
INCOME TAX:
TAXATION:

Corporations may properly deduct the fair market value at the time of gift of donations to charitable organizations.

April 29, 1959



Honorable L. A. Haake
Acting Supervisor
Income Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Haake:

You recently asked this department for an opinion on the deduction that may be allowed a corporation for a charitable gift of land to an acceptable recipient under the law. This request was made at the direction of the Director of Revenue, Mr. Milton Carpenter. The request was rather lengthy and we feel that the question may be clearly stated as follows:

"When a corporation makes a gift of land to an acceptable charity, can the corporation deduct the fair market value of the land at the time of the gift in computing their Missouri income tax or must they deduct only the cost of the land when acquired by the corporation."

Missouri Statute 143.160 reads, in part, as follows:

"In ascertaining net income there may be deducted from gross income derived during the same period the following:

* * * * *

(6) Donations which are made within the taxable year to or for the use of:

* * * * *

(b) Corporations, associations and societies organized and operated exclusively for religious, charitable, scientific, liter-

Honorable L. A. Haake

ary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; or * * *."

The Federal regulations you noted in your request allow the deduction of such a contribution at fair market value at the time of gift. (See Section 39.23, Subsection (q), Part 1(b), Subsection (3) and Section 39.23, Subsection (o), Part 1, Subsection (g).) The Federal regulations, however, are not controlling in this matter since we are dealing here with the matter of State income taxation. The Director of Revenue is given the power to promulgate rules and regulations to aid the administration of the income tax law. He is directed to make these rules and regulations follow the Federal rules and regulations as nearly as practicable. (See Section 143.200, RSMo 1949). We do not feel, however, that this provision makes the Federal rules applicable to Missouri income tax questions automatically. The Director has failed to make applicable regulations. So the statute involved must be interpreted much in the same manner as other statutory enactments. Section 143.160 allows the deduction for donations to certain charitable enterprises. It is silent as to the method used to determine the amount of the donation. Taxing statutes are construed liberally in favor of the taxpayer and this is especially true in the absence of proper regulation. We feel, therefore, that the donation must be taken at the market value at the time of the gift and that in the absence of statutory requirement or regulation any other construction would be arbitrary. We feel that the date of purchase is not material.

CONCLUSION

Therefore, corporations may properly deduct the fair market value at the time of gift of donations to charitable organizations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON
Attorney General

JEC:mc

INCOME TAX:

MISSOURI NATIONAL GUARD:

FEDERAL RESERVES:

ARMED FORCES:

ACTIVE DUTY:

1. A Missouri National Guardsman is not a member of the Armed Forces of the United States on active duty within the meaning of Section 143.105, RSMo Cum. Supp. 1957, while attending summer camp or drill period pursuant to state order. 2. A ready reservist

who is ordered to active duty by the appropriate Federal secretary for annual training is on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

3. The ready reservist attending drill period is not on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

October 14, 1959

FILED

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Honorable L. A. Haake, Supervisor
Income Tax Department
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Haake:

You recently asked us for an opinion as follows:

"It has always been the interpretation of this department that members of the military forces located on a military reservation and fully subject to military control are expressly exempt from reporting service pay up to \$3,000. The question, of course, now arises concerning the members of the national guard, who attend weekly meetings, called drill meetings, and who are required to attend summer camp for a period of two weeks. The Department's policy in the past has been to exempt the two weeks pay from taxation but to require them to report the amounts received as drill pay for the weekly meetings. I can find no legal reason on which to base this interpretation unless it would be in the definition of the term 'active duty' as used in its common form.

"Since it is now incumbent upon the Department to release regulations concerning pay of members of the armed forces, I believe that it would be in order to pose the following questions:

Honorable L. A. Haake

"1. Are members of the national guard entitled to exempt the pay they receive for drill pay of weekly meetings for state income tax purposes?

"2. Are the same members mentioned in item 1 entitled to exempt the two weeks pay when they attend summer training?

"3. Are members of the Missouri National Guard considered members of the military forces of the United States in order to exempt their drill pay from taxation?

"4. Are members of the military reserve of the United States entitled to exempt amounts received for weekly meetings and are they, likewise, entitled to exempt their two weeks training period pay, the same as members of the national guard?"

Section 143.105, RSMo Cum. Supp. 1957, reads as follows:

"The amount of service pay up to but not exceeding three thousand dollars received by a member of the armed forces of the United States on active duty in any one calendar year shall not be taxable and need not be included in his state income tax return for the year 1950 and every year thereafter. No person receiving a dishonorable discharge shall receive this exemption. The administrator, executor or next of kin of any deceased member of the armed forces may claim such exemption for such person."

In order to answer your inquiry as it relates to the Missouri National Guard, we must first determine whether a guardsman is a member of the Armed Forces of the United States on active duty while he is on annual training duty and while he is on drill duty. If he is not a member of the Armed Forces of the United States, then the above section is not applicable to him.

The term armed forces has a particular meaning under Federal law. Title 10, §101 (4), defines armed forces as follows:

"(4) 'Armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard."

Honorable L. A. Haake

National Guard is defined in the same title and section, paragraph 9, as follows:

"(9) 'National Guard' means the Army National Guard and the Air National Guard."

Army National Guard is defined in paragraph 10 as follows:

"(10) 'Army National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that--

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized."

Air National Guard is defined in paragraph 12 as follows:

"(12) 'Air National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that--

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized."

Title 10, U.S.C.A., deals with general military law but these exact definitions are repeated in Title 32, Section 101, which deals specifically with the forming of the National Guard. The

Honorable L. A. Haake

Missouri National Guard is an organized militia of the State of Missouri (See Section 41.050, RSMo Cum. Supp. 1957) and of the United States (See Title 10, Section 311, U.S.C.A.). It is subject to the call of the Governor of the State of Missouri (See Sections 41.100 and 41.110, RSMo Cum. Supp. 1957) or to call by the Federal government (See Title 10, Section 672, U.S.C.A.). The Governor of the State of Missouri is the commander in chief of the guard except when the guard is in the service of the United States. (See Section 41.080, RSMo Cum. Supp. 1957). The guard is equipped by the Federal government and is subject to Federal inspection, and its members must meet certain Federal standards as to physical and other qualifications. (See Title 32, Section 105, U.S.C.A.). Title 10, Section 672, paragraph (d) of the United States Code Annotated provides that a guardsman may be called to active duty by the Federal government with his consent and with the consent of the governor of the appropriate state at any time. The training of the guard generally is left up to the states. Title 32, Section 501 (b) reads as follows:

"(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title."

We have checked with General A. D. Sheppard of the Missouri National Guard and we find that the Missouri guard in the past has been ordered by the Governor of the State of Missouri to their annual training period.

On the basis of the above, we feel that the Army, Navy, Air Force, Marine Corps and Coast Guard comprise the Armed Forces of the United States. The National Guard is a militia force subject to Federal or State call. The usual training of the guard, including their drill periods and annual training, is performed in State, not Federal status. If this is true, then the guard is not "Armed Forces of the United States" at the time they are training and thus not eligible to claim the exemption set out in Section 143.105. We feel this conclusion is indicated also because of the treatment given guardsmen under the Federal Tort Claims Act. The Federal Tort Claims Act is found in Title 28, Sections 2671 and 2674, U.S.C.A., which read as follows:

§ 2671:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term --

"'Federal Agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of

Honorable L. A. Haake

the United States but does not include any contractor with the United States.

"'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

§ 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

It would seem that if National Guardsmen were, in fact, members of the Armed Forces of the United States, a successful action could be brought against the government for their torts committed in line of duty. This is not the case. The courts have uniformly held that a guardsman in training on state order was not covered by the Federal Torts Claims Act. This matter was taken up in *Satcher v. United States*, 101 F.Supp. 919, 920 [2], as follows:

"[2] National Guard Units of the various states are subject under the laws of the United States to be mustered into the Regular Army of the United States under directive

Honorable L. A. Haake

of the President when Congress shall have declared a National Emergency, 32 U.S.C.A. §81, but until such assigning of a unit is ordered by the President into the regular armed forces of the United States, the National Guard Unit remains a component part of the State Militia and not of the Federal armed forces."

In *Storer Broadcasting Company v. United States*, 251 F.2d 268, 269, the court said as follows:

"* * * all located decisions on the state and federal-militia relationship hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States.

"* * * If a proposition so firmly established is to be changed, we think that should be done only by the Supreme Court, and that we should abide by our former decisions."

In *United States v. Frager*, 251 F.2d 266, 267 [1], the court said as follows:

"[1] The main claim, that the United States is responsible in damages under the provisions of the Federal Tort Claims Act for the negligent acts and omissions of members of the National Guard of a State not in the active service of the United States, has been answered in the negative in *Storer Broadcasting Company v. United States*, 5 Cir., 251 F.2d 268."

Certiorari was denied in the *Frager* case and in the *Storer* case. These were both 1958 Court of Appeals cases. The Missouri National Guard has a dual status. It is part of the Ready Reserve of the United States. See U.S.C.A., Title 10, Section 269 (b). It does not train in its Federal status and we, therefore, must conclude that the National Guardsman in training as a result of state order is not a member of the Armed Forces of the United States on active duty. It should be noted that although the guardsman is made a part of the ready reserves, the training performed by the guardsman in National Guard status is considered inactive-duty training insofar as the reserves are concerned. See Title 10, Section 101 (31), U.S.C.A. Therefore, the exemption granted in Section 143.105, *supra*, does not apply to the National Guardsman in the usual case.

The next question is as to the status of the military reserve

Honorable L. A. Haake

of the United States. The laws of the United States set up what is called a ready reserve. Title 10, Section 269 (a) and (b), U.S.C.A., reads as follows:

"(a) Each person required under law to serve in a reserve component shall, upon becoming a member, be placed in the Ready Reserve of his armed force for his prescribed term of service, unless he is eligible to transfer to the Standby Reserve under subsection (e).

"(b) The units and members of the Army National Guard of the United States and of the Air National Guard of the United States are in the Ready Reserve of the Army and the Ready Reserve of the Air Force, respectively."

As before noted we see that all National Guard units are placed in the ready reserve. There are other members of the ready reserve, however, who are not National Guard members. The ready reserve is required to train. Title 10, Section 270, (a), reads as follows:

"(a) Except as specifically provided in regulations to be prescribed by the Secretary of Defense, or by the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, each person who is inducted, enlisted, or appointed in an armed force after August 9, 1955, and who becomes a member of the Ready Reserve under any provision of law except section 269(b) of this title, shall be required, while in the Ready Reserve, to--

(1) participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training not more than 17 days during each year; or

(2) serve on active duty for training not more than 30 days during each year."

The National Guard is not required to train under this section even though the National Guard is part of the ready reserve. The ready reservist who is not in the National Guard is required to attend drills and/or to go on active duty. He is called to active duty with his consent by virtue of Title 10, Section 672 (d). He is called to duty by the "secretary". Secretary is defined in Title 10, Section 101 (8), as follows:

Honorable L. A. Haske

"(8) 'Secretary concerned' means--

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of the Treasury, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy."

In short, members of the Ready reserve who are not guardsmen are required to train. They are not state militia. They are ordered to active duty with their consent by the proper Federal secretary. Title 10, Section 678, U.S.C.A., allows the reserve to be detailed to duty with any armed force or otherwise as the secretary sees fit. We feel, therefore, that the ready reservist who is ordered to active duty by the Federal government becomes a member of the Armed Forces of the United States. We must next determine his status as to active or inactive duty. Title 10, Section 101 (22), U.S.C.A., defines active duty as follows:

"(22) 'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

Title 10, Section 101 (31), U.S.C.A., defines inactive duty as follows:

"(31) 'Inactive-duty training' means--

(A) duty prescribed for Reserves by the Secretary concerned under section 301 of title 37 or any other provision of law; and

(B) special additional duties authorized

Honorable L. A. Haake

for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

"It includes those duties when performed by Reserves in their status as members of the National Guard."

Title 37, Section 301 (a), U.S.C.A., reads as follows:

"(a) Under such regulations as the Secretary concerned may prescribe, and to the extent provided for by law and by appropriations, members of the National Guard, Air National Guard, National Guard of the United States, the Air National Guard of the United States, Army Reserve, Naval Reserve, Marine Corps Reserve, Coast Guard Reserve, and the Reserve Corps of the Public Health Service, shall be entitled to receive compensation at the rate of one-thirtieth of the basic pay authorized for such members of the uniformed services when entitled to receive basic pay, for each regular period of instruction, or period of appropriate duty, at which they shall have been engaged for not less than two hours, including those performed on Sundays and holidays, or for the performance of such other equivalent training, instruction, or duty or appropriate duties as may be prescribed by the Secretary concerned, and additionally, in the discretion of the Secretary concerned, enlisted members of the above services shall be entitled to rations in kind, or a portion thereof, when the instruction or duty period or periods concerned total eight or more hours in any one calendar day: Provided, That for each of the several classes of organizations prescribed for the National Guard, Air National Guard, National Guard of the United States, the Air National Guard of the United States, the Army Reserve, Naval Reserve, Marine Corps Reserve, Coast Guard Reserve, and the Reserve Corps of the Public Health Service, the rules applicable to each of which services and classes within service may differ, the Secretary concerned--

Honorable L. A. Haake

(1) shall prescribe minimum standards which must be met before an assembly for drill or other equivalent period of training, instruction, or duty or appropriate duties may be credited for pay purposes, which minimum standards may require the presence for duty of officers and enlisted personnel equal to or in excess of a minimum number or percentage of unit strength for a specified period of time with participation in a prescribed character of training;

(2) shall prescribe the maximum number of assemblies, or periods of other equivalent training, instruction, or duty or appropriate duties, which may be counted for pay purposes in each fiscal year;

(3) shall prescribe the maximum number of assemblies, or periods of other equivalent training, instruction, or duty or appropriate duties which can be counted for pay purposes in lesser periods of time; and

(4) shall prescribe the minimum number of assemblies or periods of other equivalent training, instruction, or duty or appropriate duties, which must be completed in stated periods of time before the personnel of organizations or units can qualify for pay."

We feel that the ready reservist called to active duty for annual training by the secretary of the appropriate Federal service is a member of the Armed Forces of the United States on active duty and that pay received would qualify for the income exemption provisions of Section 143.105. The reservist attending drill period is on inactive duty and moneys paid him for such attendance do not qualify for exemption under Section 143.105. It should be noted that the National Guard could be called to active duty by the Federal government for training with their consent and with the consent of the governor, and if they were so called their status would be the same as the ready reservist.

There may be some question as to the wisdom of legislation which allows an exemption from income tax for moneys paid a reservist on annual training duty and denies that exemption for guardsmen. Under the existing law we feel that our conclusion that such a distinction does exist is inescapable. The remedy, if one be called for, lies with the legislature.

Honorable L. A. Haake

CONCLUSION

It is the opinion of this office that:

1. A Missouri National Guardsman is not a member of the Armed Forces of the United States on active duty within the meaning of Section 143.105, RSMo Cum. Supp. 1957, while attending summer camp or drill period pursuant to state order.
2. A ready reservist who is ordered to active duty by the appropriate Federal secretary for annual training is on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.
3. The ready reservist attending drill period is not on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

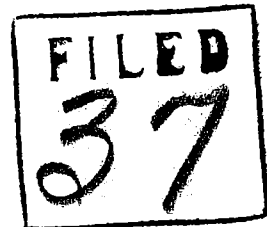
JOHN M. DALTON
Attorney General

JEC:mc

TAXATION:
BUILDINGS ON LEASED
REAL ESTATE:

Where buildings located on leased lands have been assessed as personal property, the amount of the taxes for the years that the buildings have been so assessed may not be included in the sale of such buildings for delinquent real estate taxes at the delinquent tax sale.

May 29, 1959



Honorable Charles E. Hansen
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

This is in response to your request for an opinion dated May 21, 1959, which reads as follows:

"The Collector of Franklin County has requested that I write for an opinion concerning the sale of 'buildings on leased land for delinquent taxes'. The Assessor, for the years 1954, 1955, 1956 and 1957, assessed these buildings and club houses as personal property. For the year 1958, the Assessor assessed these buildings on leased land and listed them in the real estate book. These taxes are now five years delinquent and therefore, the question resolves itself as to whether the Collector should sell these buildings at the delinquent real estate tax sale in August of this year.

"Also, should the taxes for the years 1954 through 1957 be figured in on this sale?"

We are enclosing herewith copies of our opinions of April 19, 1939 to Mr. Clarence Evans, February 4, 1942 to Honorable O. A. Kamp, and September 19, 1953 to Honorable Hubert Wheeler, wherein it was concluded that under Missouri tax laws buildings and improvements placed upon leased lands

Honorable Charles E. Hansen

are to be taxed as real property. See also State ex rel. v. Personnel Housing, 300 SW2d 506.

You inquire as to whether the taxes for the years of 1954 through 1957 should be included in the sale of the buildings mentioned in your letter if they are sold at the delinquent real estate tax sale in August of this year.

We know of no provisions in the statutes relating to delinquent taxes wherein the sale of real property is authorized to satisfy delinquent personal property taxes unless such sale is under an execution levied after a personal judgment for the amount of the delinquent personal property taxes has been obtained against the taxpayer.

If the buildings were assessed as personal property for the years of 1954 through 1957, we are of the opinion that the amount of the taxes and penalties for those years may not be included in the sale of the buildings in the delinquent real estate tax sale for the reason set out herein above.

CONCLUSION

Therefore, it is the opinion of this department that where buildings located on leased lands have been assessed as personal property, the amount of the taxes for the years that the buildings have been so assessed may not be included in the sale of such buildings for delinquent real estate taxes at the delinquent tax sale.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH:lvd:ml
Enclosures

LIBRARIES: After merger of a municipal library district
MERGER: with a county library district, in accordance
CITY AND COUNTY: with the provisions of Sec. 182.040, RSMo Cum.
COUNTY LIBRARY TAX: Supp., 1957, it is the responsibility of the
BY WHOM COLLECTED: municipality to collect the library tax at the
rate levied for county library purposes. When
taxes have been collected by proper city officials, proceeds shall
be turned over to county treasurer, who shall credit same to county
library fund as provided by Sec. 182.020, RSMo Cum. Supp. 1957.

June 18, 1959

Honorable Charles E. Hansen
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Mr. Hansen:

This department is in receipt of your request for a legal opinion, which reads as follows:

"At the request of the County Court, the Trustees of the Free County Library District, and the City of Pacific, I would request an opinion on the following: During the year 1958, the County of Franklin by vote of the people established a free county library district. On March 17th, 1959, the City of Pacific, having a city library supported by municipal tax by vote of the Board of Aldermen passed an ordinance requesting that the City of Pacific become part of the county library district. Section 182.040 RSMo., 1955 Supplement reads in part, to-wit: after the establishment of a free county library district the legislative body of any incorporated city which was excluded from the county library district because of the maintenance of a tax supported municipal library . . . may become a part of the free county library district by notifying the County Court that the municipality desires to become a part of the free county library district at the beginning of the next succeeding full fiscal year; and thereafter the municipality shall be liable for taxes for free county purposes.

"One of the questions to be resolved is whether the municipality or the county is to collect the taxes, Section 182.040 in part saying: 'and thereafter the municipality shall be liable for the taxes levied for free county library purposes at the same rate as is levied for the free county library district in such county', Section 182.030 regarding the inclusion in the district by vote of the people within

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the city states in part: 'at the beginning of the next fiscal year and the property within the municipal library district shall be liable to taxes levied for free county library purposes'. My view on this matter is that the municipality must collect taxes and pay the same over to the county library district."

The inquiry expressed in your letter is whether a municipality, after its municipal library district becomes a part of a county library district, shall collect the library taxes for that portion of the county library district comprising the municipality, or whether the county shall collect such library taxes in the municipality.

All sections referred to herein are to RSMo Gen. Supp. 1957, unless otherwise specified.

Section 182.020, provides how county library taxes are levied and collected. Said section reads as follows:

"1. If, from returns of the election, the majority of all the votes cast on the propositions at the election shall be 'For establishing county library district', and for the tax for a free county library, the county court shall enter of record a brief recital of the returns and that there has been established '. county library district', and thereafter such '. county library district', shall be considered established; and the tax specified in the notice, subject to the provisions of this section, shall be levied and collected, from year to year.

"2. The proceeds of the levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund', and be kept separate and apart from other moneys of the county, and disbursed by the county treasurer only upon the proper authenticated warrants of the county library board.

"3. The tax may be reconsidered whenever the qualified electors of any county library district shall so determine by a majority vote given at any annual election held therein on such propositions after petition, order of the court, and notice of the election and of the purpose thereof, first having been

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made, filed and given, as in the case of establishing such county library district. At least five years must elapse after the county library district has been established and a tax therefor has been levied before an election may be held on a proposition to reconsider the tax.

"4. As used in sections 182.010 to 182.120, the words 'county court' shall be construed to mean the proper court or official in any county operating under a special charter."

Section 182.140 provides how a city library district is organized and also how a tax for the establishment and maintenance of a municipality are levied and collected. Said section reads in part as follows:

"1. Whenever qualified electors equal to five per cent of the total vote cast for governor at the last election in any city now or hereafter containing more than five thousand inhabitants petition the mayor, common council or other proper governing body in writing asking that an annual tax be levied for the establishment and maintenance of a free public library in the city, and specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over six hundred thousand inhabitants not to exceed one mill on the dollar annually, on all the taxable property in the city, the governing body shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on the question. The officer shall furnish ballots, poll books and other necessary election items, and the expense of the election shall be paid out of the city treasury in the same manner with like effect and by the same officers as in the case of other city elections. The order of the governing body and the notice shall specify the name of the city and the rate of taxation mentioned in the petition, and the officer shall make and file in his office, return of service of the notice. Every voter within the city may vote

'For a _____ mill tax for a free public library,'

or

'Against a _____ mill tax for a free public library.'

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"If, from returns of the election, the majority of all the votes cast on the proposition at the election is 'for a mill tax for a free public library,' the governing body shall enter of record a brief recital of the returns and that there has been established a public library and thereafter the free public library shall be established, and shall be a body corporate, and known as such.

"2. The tax specified in the notice, subject to the provisions of this section, shall be levied and collected, from year to year, in like manner with other general taxes of the city. The proceeds of the levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the city treasury and shall be known as the 'city library fund', and shall be kept separate and apart from other moneys of the city, and disbursed by the proper city finance officer only upon proper authenticated warrants of the city library board of trustees.

"3. In case the proposed mill tax is sought as an increased tax for the maintenance of a free public library already established over a lesser tax rate theretofore voted and adopted, then such fact shall be recited in the petition and the notice of the election, and the ballot shall submit to the voters the proposition

'For a mill tax increase over the present mill tax for the free public library,'

or

'Against a mill tax increase over the present mill tax for the free public library.'

"If a majority of all the votes cast on the proposition at the election is for the tax submitted, the tax specified in the notice shall be levied and collected in like manner with other general taxes of the city, and shall be known as and become a part of the city library fund and be administered as provided in section 182.200."

The last above-quoted section authorizes the levy and collection of a tax annually, from year to year, in like manner as general taxes, for establishing and maintaining a free public library in the city. The proceeds of the levy, together with all accruing

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interest, library fines, bequests and donations in money are required to be deposited in the city treasury to the credit of the city library fund, which fund shall be kept separate and apart from other funds, and can be disbursed by the proper finance officer only upon the properly authenticated vouchers of the city library board of trustees.

A municipal library district may become a part of a county library district by following the procedure outlined in Section 182.030, or Section 182.040.

Section 182.030 reads as follows:

"When qualified electors equal to five per cent of the total vote cast for governor at the last election in an existing municipal library district within the geographical boundaries of a proposed or existing county library district shall petition in writing the county court to be included in the proposed or existing county library district, subject to the official approval of the existing county library board, the qualified voters of the municipal library district shall be permitted to vote on the proposition for establishing or joining the county library district, and on the proposition for a tax levy for establishing and maintaining a free county library. If the proposition carries by a majority vote, the municipal library district shall become a part of the county library district at the beginning of the next fiscal year and the property within the municipal library district shall be liable to taxes levied for free county library purposes. If a majority of voters in the existing municipal library district oppose the county library district, the existing municipal library district shall continue."

Section 182.040 reads as follows:

"After the establishment of a free county library district the legislative body of any incorporated city, town or village in the county which was excluded from the county library district because of the maintenance of a tax supported municipal library established and maintained pursuant to other provisions of this chapter, after approval of the proposed change by the trustees of the free county library district, may become a part of the free county library district by notifying the county

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court that the municipality desires to become a part of the free county library district at the beginning of the next succeeding full fiscal year; and thereafter the municipality shall be liable for taxes levied for free county library purposes at the same rate as is levied for the free county library district in such county."

The principal difference between these two sections is that the former permits a merger of a city and a county library district, when subject to the official approval of the existing county library board, the qualified electors equal to five per cent of the total vote cast for governor at the last election in an existing municipal library district, petition the county court for an election to vote upon the proposition as to whether or not the municipal library district shall be included in the existing or proposed county library district of the same county in which the municipal district is located, and a majority of votes cast at the election are in favor of the proposition, the municipal library district shall become a part of the county library district at the beginning of the next fiscal year. The property in the municipal district shall then be liable to county library tax.

Under provisions of the latter section, the proposed merger of the municipal and county library districts is not submitted to a vote of the electors of the municipal district. In such instances, when a petition with the requisite number of signers is presented to the city council, and the prior approval of the merger has been obtained from the county library board, the city council then notifies the county court of the desire of the municipal library district to merge, and become a part of the county library district, and the former district will become a part of the latter district at the beginning of the next succeeding full fiscal year. Thereafter, the municipal district shall be liable for library taxes levied at the same rate as in the county district.

Upon closer scrutiny, it appears that the above-mentioned statutes differ in still another particular, to which is attached greater significance. In view of the fact that above sections were passed by the Legislature as a part of the same act, it is believed each section was not only intended to provide a different procedure for merging of county and municipal districts, but that it was also the legislative intent to provide a different procedure in each section for collection of library taxes, after the merger has taken place and as shown by the provisions of each section.

In Section 182,030 is the statement "and the property within the municipal library district shall be liable to taxes levied for free county library purposes". We construe this statement to mean that after the merger of a city and county library district, in

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accordance with Section 182.030, the county library tax shall continue to be levied, collected, and paid over to the county treasurer, as authorized by Section 182.020, for county library districts, as before the merger, by the proper county officials, except that after the merger such county officials shall also collect the county library tax in that territory of the county formerly comprising the municipal library district.

In Section 182.040 is the statement "and thereafter the municipality shall be liable for taxes levied for free county library purposes at the same rate as is levied for the free county library district in such county". We construe the foregoing statement to mean that after the merger of a city and a county library district has been effected under provisions of Section 182.040, it is the responsibility of the municipality to continue the collection of a library tax authorized by Section 182.140. However, the rate of taxation shall be the same as the county library tax, and the tax shall be imposed upon all property located in the municipality. When the taxes have been collected by the proper city officials, they shall turn over the proceeds to the county treasurer who shall credit them to the county library fund, as provided by Section 182.020, supra.

From the facts disclosed in the opinion request, it appears that the procedure authorized by Section 182.040 has been attempted, and for our present purposes it will be assumed that such procedural requirements have been met and the municipal library district of the City of Pacific has been legally merged with and has become a part of the county library district of Franklin County.

In view of these circumstances, it is the responsibility of the City of Pacific to collect the library tax at the rate levied for county library purposes. When the officials of the City of Pacific have collected the library tax, they shall turn the proceeds over to the County Treasurer of Franklin County, who shall credit the proceeds to the library fund, as provided by Section 182.020, supra.

CONCLUSION

Therefore, it is the opinion of this department that after the merger of a municipal library district with a county library district, in accordance with the provisions of Section 182.040, RSMo. Cum. Supp. 1957, it is the responsibility of the municipality

Honorable Charles E. Hansen

to collect the library tax at the rate levied for county library purposes. When the taxes have been collected by the proper city officials, they shall turn over the proceeds to the county treasurer, who shall credit same to the county library fund, as provided by Section 182.020, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

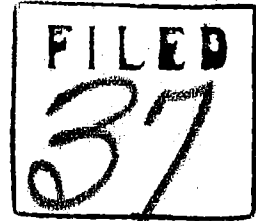
PNC/ld

WATER POLLUTION BOARD:

The Water Pollution Board is not authorized to grant to any one person, company, or corporation, the exclusive right to construct and operate a system for the disposal of sewage and/or other wastes in a specific watershed.

SEWAGE DISPOSAL PLANTS:

June 25, 1959



H. M. Hardwicke, M. D.
Acting Director
Division of Health and Welfare
Jefferson City, Missouri

Dear Dr. Hardwicke:

Your recent request for an official opinion reads:

"Enclosed are copies of two letters from Mr. John J. Fischer, 8703 St. Charles Road, St. Louis 14, Missouri, together with a copy of our letter to Mr. Fischer under date of May 29, 1959, relative to exclusive privilege of operating in a watershed.

"Will you please advise as to whether or not the Water Pollution Board is legally authorized to grant to any one person, company or corporation, the exclusive right to construct and operate a system for the disposal of sewage and/or other wastes in a specific watershed under the provisions of Section 204.030, Revised Statutes of Missouri, Cumulative Supplement 1957."

Section 204.030, RSMo Cum. Supp. 1957, reads:

"1. It is unlawful for any person to cause pollution as defined in section 204.010. Any such action is hereby declared to be a public nuisance.

"2. No person, without first securing from the board a permit, shall construct, install or modify any system for disposal of sewage, industrial wastes, or other wastes or any extension or addition thereto

when the disposal of the sewage, industrial wastes or other wastes constitutes pollution as defined in this chapter; increase the volume or strength of any sewage, industrial wastes or other wastes in excess of permissive discharges specified under any existing permit; or construct or use any new outlet for the discharge of any sewage, industrial wastes or other wastes into the waters of the state which constitutes pollution as defined in this chapter.

"3. Any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in the discharge of sewage, industrial wastes or other wastes into the waters of the state shall apply to the board for a permit to make a discharge which constitutes pollution as defined in this chapter. The board, under the conditions it prescribes, may require the submission of such plans, specifications and other information as it deems relevant in connection with the issuance of the permits. The board shall determine whether or not the discharge will cause a condition of pollution contrary to the public interest. The board may issue a permit which authorizes the person to make the discharge, and may specify on the permit the conditions under which the discharge shall be made. The board may revoke or modify any permit if the holder of the permit is found to be in violation of subsection 2, or if the holder of the permit fails to operate an existing facility as specified in the approved plan. No permit may be revoked or modified without first giving thirty days' written notice to the holder of the permit of intent to revoke or modify the permit."

A careful examination by us of this section fails to disclose any direct or indirect authorization of the Water Pollution Board to place the limitation upon the issuance of permits which is the subject of your inquiry. Neither does the chapter which sets up the Water Pollution Board take any cognizance of the geographical area designated by you as a "watershed." It would appear that the implication of Section 204.030, supra, is that the Board may issue such permits as it determines any particular situation warrants.

H. M. Hardwicke, M. D.

CONCLUSION

It is the opinion of this department that the State Water Pollution Board is not authorized to grant to any one person, company, or corporation, the exclusive right to construct and operate a system for the disposal of sewage and/or other wastes in a specific watershed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

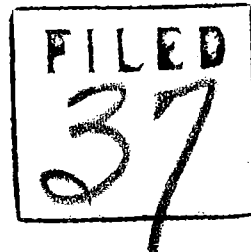
John M. Dalton
Attorney General

WPD:bw

TAXATION:
TAX SALES:
COLLECTORS:
COLLECTOR'S DEEDS:

When a collector issues a deed on the third sale of property for delinquent taxes to a purchaser who has purchased more than one tract, all of the tracts purchased by one individual must be included in one deed. Person going in boat and fishing over land flooded by river not liable to prosecution for trespassing.

July 9, 1959



Honorable Morran D. Harris
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Mr. Harris:

You have recently requested an opinion from this office concerning collector's deeds on tax sales, which request reads:

"In 1958 the County Collector of St. Clair County, advertised for sale and sold some 900 tracts or descriptions of land in the subdivision of Monegaw Springs in St. Clair County, Missouri. All of the tracts, about which we are here concerned, amounting to about 900, were purchased, on third sale, by Edwin W. Mills, trustee for and on behalf of St. Clair County, Missouri, and the County Collector prepared and delivered to the said trustee, a separate deed for each and every tract purchased, and billed the same to the county at the rate of \$1.50 each, for which he was paid more than \$1300.00. The County Court and the Auditor's office are of the opinion that all of said tracts should have been included in one deed, since they were all sold to one purchaser and that the County Collector should have been paid for only one deed under the provisions of Sec. 140.420(2), R.S., Missouri 1949. We would like an official opinion on this matter from your office."

Section 140.420, RSMo 1949, provides for the issuance of a collector's deed to the holder of a certificate of purchase. Paragraph 2 of this section specifically provides that the collector's deed shall include all parcels of land which are sold to the same

Honorable Morran D. Harris

purchaser. Prior to 1939, this section applied to all tax sales since in all tax sales the purchaser at the sale received a certificate of purchase and the owner had a specified period within which to redeem his land from the tax sale.

In 1939 the Jones-Munger Act was amended. These provisions are now found in Section 140.250, RSMo 1949. This section provides that there shall be no period of redemption from the third sale for taxes and that the purchaser at such third sale shall be entitled to the immediate issuance and delivery of the collector's deed. This history and the effect of this amendment is pointed out in *Journey vs. Miller* (en banc) 363 Mo. 163, 250 S.W.2d 164.

Thus, as is pointed out in the *Journey* case, the provisions of Section 140.240, RSMo 1949, as to the issuance of a collector's deed to the holder of a certificate of purchase, cannot apply to a purchaser at a third sale because no such certificate of purchase is issued at a third sale, but such purchaser is entitled immediately to a collector's deed. This change in the law materially changed the rights of a purchaser at a third sale to a collector's deed. However, there was no necessity for a change in the provisions as to what such deed should contain and it is not believed that the Legislature did, in fact, make any such change.

It is, therefore, our conclusion that the provisions of paragraph 2 of Section 140.420, RSMo 1949, requiring the collector to include in one deed all parcels of land purchased by one individual, apply to a purchaser at a third sale who is entitled to an immediate deed, as well as to a purchaser at the first or second sale who, at the appropriate time, and in the absence of redemption, presents his certificate of purchase and is entitled to a collector's deed.

As to the second question in your opinion request, concerning the obligations of the county and the special road district to repair a bridge within the road district, we enclosed herewith three former opinions of this office which we believe will answer your question. These opinions are, one dated September 13, 1952, to the Honorable Morran D. Harris, prosecuting attorney of St. Clair County; another dated January 24, 1945, to Honorable Forrest Smith, State Auditor, and the third dated January 27, 1948, to the Honorable Frank Adams, prosecuting attorney of Polk County.

As to your third question concerning the possibility of criminal prosecution for trespassing of one who operates his boat upon flood waters over private property, we have searched the statutes in light of the facts given by you and find no statute which would authorize such prosecution.

Honorable Morran D. Harris

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that the collector is required by paragraph 2 of Section 140.420, RSMe 1949, to include all tracts sold at third tax sales to the trustee for the county in one deed, and that such collector is entitled to the fees for making only one deed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

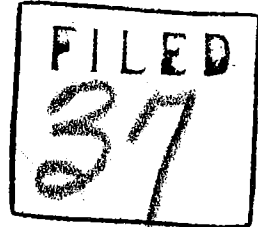
Yours very truly,

John M. Dalton
Attorney General

Enc. (3)
F.L.H.

REGISTRATION OF BIRTHS: It is the opinion of this department that children born in a foreign country to residents of Missouri who are in a foreign country in the armed services or in employment may upon return to Missouri have made in their behalf application for registration and the issuance of birth certificates by the Department of Vital Statistics of the Division of Health of Missouri, and may be so registered and may receive such certificates.

August 6, 1959



H. M. Hardwicke, M. D.
Deputy Director
Division of Health
State Office Building
Jefferson City, Missouri

Dear Doctor Hardwicke:

Your recent request for an official opinion reads:

"May we have an opinion concerning the legal right of the Bureau of Vital Statistics of the Division of Health to register children born overseas to Missouri parents.

"Up to the present time children born to parents who are either in the Armed Services or employed in foreign countries have been refused birth registration and certification in this state. Federal laws and regulations appear to be nebulous, overlapping and sometimes difficult for interpretation. The United States Attorney has given an opinion to the United States Public Health Service that a federal certificate of United States citizenship only may be obtained in these cases. No standard birth certificate is available from the federal government.

"During the recent session of the Legislature, House Bill 384 was enacted and signed into law by the Governor on June 2, 1959. This law provides for the registration and birth certification of children of foreign parentage adopted by Missouri parents. This law requires only a standard procedure of adoption before a Missouri court.

H. M. Hardwicke, M. D.

"Children born of Missouri parentage overseas have in the past been refused birth certificates. This refusal is apparently based on regulations. Missouri law appears to be silent on this subject except to provide against double registration, that is, registration in this and another state. Federal regulations as found in Army Regulations 608-68 read as follows: 'The parents may, upon return to the United States, again record the birth of the child with the proper officials of their state in accordance with the local laws, if such action is permissible under the laws of their state of domicile.' Should this office implement a procedure for the registration and certification of children when a properly executed certificate of citizenship is presented to us?

"Should this office make and issue a regular birth certificate upon the affidavit of the parents provided the birth records of such parents are on file in this office and provided certification of citizenship is presented to this office?

"It would appear if a procedure of this nature is not permissible, a record of the birth of children born overseas to Missouri parents will not be recorded anywhere in the United States."

You direct our attention to House Bill 384 enacted by the Seventieth General Assembly which became effective June 2, 1959. That bill applies only to adopted and not to natural born children of Missouri residents and so is not applicable in the situation which you set forth.

Subsequent to writing the opinion request above, you have informed us orally that the situation which you have in mind is one in which Missouri residents and citizens go to a foreign country in government service, either civil or military, reside there for a time, during which time there is born to them a child or children; that subsequently they return and resume their residency in Missouri and apply to the Bureau of Vital Statistics of this state for a birth registration for their child or children born abroad. We assume that the children about whom you inquire are minors.

H. M. Hardwicke, M. D.

We believe that the Missouri Bureau of Vital Statistics may grant a birth certificate to such children as are here under consideration.

Section 193.200, RSMo 1949, reads:

"A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court."

It will be noted that the above section holds that a resident of Missouri, which the infants in the instant case are by virtue of the residence of their parents, born outside of this state, whose births are not recorded in any other state, may receive birth certificates upon the submission of such proof as shall be required by the Division of Health.

At this point we take note of an opinion rendered by this department on October 31, 1949, to Ben W. Oliver, Representative. In this opinion we construed Section 193.200, supra, which at that time was Section 20 of House Bill No. 207. We gave particular attention to the meaning of the words "recorded in any other state" In that opinion, a copy of which is enclosed, we stated (Page 2):

"We take the term 'state' to mean the states of the United States and territories and possessions of the United States where recordation is carried on. We believe that a reasonable interpretation to be given the phraseology 'recorded in any other state' would include any county or municipal office where such birth may be recorded. In the event a copy of such record would be available to the person interested it would certainly be of more evidentiary value than one filed in the Bureau of Vital Statistics of Missouri under the provisions of House Bill No. 207."

We may say here that we see no basis for restricting the application of 193.200, supra, to a person born in some other state of this country, or territory or possession. We believe that the language of the section is sufficiently inclusive to

H. M. Hardwicke, M. D.

include a person born in a foreign country. We believe, therefore, that children born in a foreign country of persons who are Missouri residents who return to Missouri, become residents of Missouri by virtue of the residency of their parents and therefore come within the purview of Section 193.200, supra, and may apply for birth certificates on the basis of the authority of the above section.

CONCLUSION

It is the opinion of this department that children born in a foreign country to residents of Missouri who are in a foreign country in the armed services or in government employment may, upon return to Missouri, have made in their behalf application for registration and the issuance of birth certificates by the Department of Vital Statistics of the Division of Health of Missouri, and may be so registered and may receive such certificates.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

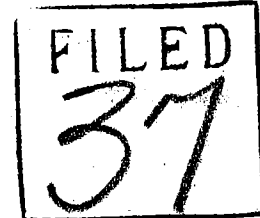
Yours very truly,

John M. Dalton
Attorney General

HPW:bw:gn
Enclosure

BUREAU OF VITAL STATISTICS: The Bureau of Vital Statistics in the State of Missouri may separate the health and medical section of the Standard Certificate of Live Birth from the upper portion of the certificate, and the health and medical section may, after analysis and preservation on IBM cards, be destroyed.

December 24, 1959



Honorable H. M. Hardwicke, M.D.
Deputy Director
Division of Health
221 West High Street
Jefferson City, Missouri

Dear Dr. Hardwicke:

Your recent request for an official opinion reads:

"May we have an opinion concerning the legal right of the Bureau of Vital Statistics, Missouri Division of Health, to separate the health and medical section of the Standard Certificate of Live Birth from the upper portion of the certificate so that the health and medical section, after analysis, can be destroyed; while at the same time, the Division could make it mandatory that the attendant at the birth complete the health and medical section. There are at least three essential medical questions that will remain on the permanent portion to be kept.

"The Missouri Division of Health, because of an increased interest in the medical aspects concerning the pregnancy and delivery of a child, has found it necessary to increase the size of the birth record so that additional health information can be collected. Because this increase would necessitate additional storage space, it is felt that after the information has been analyzed, the original health and medical section is of no value to the Division and therefore should be destroyed so that storage space could be saved. While the second half will be destroyed, it will be permanently kept on I.B.M. cards but will not be identified as to what birth it represents.

Honorable H. M. Hardwicke, M.D.

"In the past the health and medical section of the Division was considered confidential. It is planned this will still be confidential and is being collected for statistical purpose.

"Enclosed please find copies of the Standard Certificates of Live Birth for the state of Kansas and District of Columbia. These certificates have been submitted for your information because the proposed Standard Certificate for the state of Missouri would closely resemble the enclosures.

"We are enclosing a copy of the Missouri Standard Certificate as now being used. We believe the precedent for this being done is shown by the enclosed two certificates and the fact that approximately sixteen other states have a certificate of the same type."

Your inquiry is whether you have the authority to separate the health and medical section of the Standard Certificate of Live Birth from the upper portion of the certificate so that the health and medical section, after analysis, can be destroyed. This you wish to do, you inform us, in the interest of conserving storage space.

Section 192.060, RSMo 1949, requires the Division of Health to obtain and "preserve" information regarding births and deaths. It would clearly appear from this section that the methods, forms and manner of obtaining and preserving this information is left very largely to the discretion of the division.

Numbered paragraph 3 of Section 193.030 adds to this impression. This paragraph reads:

"The division shall:

(3) Make and may amend, after notice and hearing, necessary regulations, give instructions and prescribe forms for collecting, transcribing, compiling and preserving vital statistics."

Honorable H. M. Hardwicke, M.D.

In view of the above, we believe that, as we stated, the method by which the information will be obtained and preserved is largely left to the discretion of the division. It appears to us that you are simply asking whether you can change the present form and manner of preserving certain information since you state that "while the second half will be destroyed, it will be permanently kept on IBM cards * * *." Since all of the information which is now preserved will continue to be preserved but simply in a different manner, and since, from the statutes quoted above, it seems clear that wide discretion is conferred upon the division as to the manner of obtaining and preserving the information in question, that it would be within the discretion of the division to change the manner of preserving the information in the manner set forth in your above opinion request.

CONCLUSION

It is the opinion of this department that the Bureau of Vital Statistics in the State of Missouri may separate the health and medical section of the Standard Certificate of Live Birth from the upper portion of the certificate, and that the health and medical section may, after analysis and preservation on IBM cards, be destroyed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

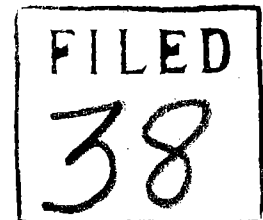
JOHN M. DALTON,
Attorney General

HPW:ax/om

SCHOOL: 1. Common school districts, at a special meeting called
SCHOOL DISTRICTS: to vote upon an annexation proposal, cannot vote to annex
ELECTIONS: to either one or the other of two separate consolidated
school districts at the same meeting. 2. Where more than
one petition for annexation is presented to the board of directors of a
common school district, it is their duty to submit the proposition contained
in the first petition received by them to a vote at a special meeting called
for that purpose. 3. When a special meeting for the annexation of an en-
tire common school district to an adjoining consolidated school district,
held under the provisions of Section 165.300, RSMo 1949, as amended, such
district may not hold another special meeting under said section within two
years from the date of such meeting. 4. The board of directors of a common
school district upon receiving an annexation petition are required under the
provisions of Section 165.300, RSMo 1949, as amended, to call a special meet-
ing and submit the proposal to a vote at said meeting. They have no author-
ity under the statute to call a special election. At the special meeting,
the majority of the qualified voters present may not vote to postpone or
delay submission of the annexation proposition to a formal vote. NOTE:
Section 162.441, RSMo, effective 7-1-65 replaces § 165.300, RSMo 1949. Under
subsection (6) nonadjoining districts may annex in certain circumstances.
Under subsection (5) the two year prohibition against subsequent elections
only applies where the first election was defeated by a majority.

April 27, 1959

Honorable Warren E. Hearnest
Majority Floor Leader
House of Representatives
Jefferson City, Missouri



Dear Sir:

This is in response to your request for an opinion dated
April 13, 1959, which reads as follows:

"I am requesting your opinion as to whether a
common school district, which has had submit-
ted to it two valid petitions, one requesting
an election on the question of annexation to
an adjoining consolidated school district, and
the other on the question of annexation to a
different consolidated school district, can
use its discretion as to which question shall
be submitted first; or, if both can be sub-
mitted at the same election or meeting; or,
if the one submitted first must be given con-
sideration or voted on first; or, if both can
not be submitted at the same election or meet-
ing, must the board wait two years to submit
the other should the first one fail; or, if one
is submitted to a meeting rather than an elec-
tion, may the majority present postpone the
question?"

The annexation of a common school district to a consolidated
school district is governed by Section 165.300, RSMo 1949, as
amended. This statute, which is too lengthy to set out here in
full, provides the steps which must be taken in order to effect
an annexation and, among other things, states that:

Honorable Warren E. Hearnnes

"1. Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to seven hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter.

* * * * *

"4. The voting at said special school meeting or special election shall be by ballot, as provided for in section 165.267, in the case of common school districts, or as provided for in section 165.330 in the case of town, city or consolidated school districts, and the ballots shall be

For annexation

and

Against annexation

* * * * *

Preliminary to answering the questions raised in your request, we would like to advise that in this opinion we are assuming that both of the consolidated school districts adjoin the common school district.

In your request you state that one of the petitions provides for annexation to an adjoining consolidated school district, and the other petition provides for annexation to a different consolidated school district. If the common school district does not adjoin the consolidated school district described in the latter petition, then there is no question as

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to which proposition must be submitted to the voters at a special meeting or special election, since Section 165.300, supra, provides only for annexation to an adjoining city, town or consolidated school district.

For purposes of clarity we have chosen to treat the issues raised in your request as four separate and distinct questions, and have handled each question separately and independently.

Question 1.

Where two valid petitions have been received by the board of directors of a common school district, each calling for annexation to a different adjoining consolidated school district, may both annexation propositions be submitted to a vote at the same special meeting?

This question was considered quite thoroughly in an opinion prepared by Assistant Attorney General James W. Faris, dated April 12, 1951, and addressed to the Honorable George Henry, Prosecuting Attorney of Newton County. The conclusion was reached in that opinion that a common school district cannot vote to annex to either one or the other of two separate consolidated school districts at the same special meeting. A copy of said opinion is enclosed herewith for your information.

Question 2.

Where two valid petitions have been received by the board of directors of a common school district, each calling for annexation to a different adjoining consolidated school district, is it discretionary with the board as to which petition shall be submitted to a vote or is the board required to submit the proposition contained in the first petition it receives?

We are of the opinion that the board of directors has no discretion as to which proposition is to be submitted to a vote. The wording of the statute makes it mandatory that they submit the first valid petition received by them. The section provides, " * * * upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special election * * * ."

In the case of State ex rel. Fry v. Lee, 314 Mo. 486, at page 501, the Supreme Court of Missouri said:

"Relators contend that the first jurisdictional act under the statute is the

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filing with the county superintendent of public schools of a petition signed by at least twenty-five qualified voters of the community. Respondent, on the other hand, contends that the first jurisdictional act under the statute is the posting, by the county superintendent, of the plats and notices required by the statute."

The Court at page 507 said:

"* * * Immediately upon the filing of the petition, jurisdiction over the subject-matter of the proceeding was acquired by, and vested in, the Superintendent of Public Schools of Camden County, and such jurisdiction remained in him until the question of the formation of the proposed consolidated district was determined by the qualified voters of the proposed district at the special meeting called by him for the consideration of that question.
***"

The Court, on page 503 said:

"State ex rel. v. Young, supra, chiefly relied upon by respondent in support of his contention, was a mandamus proceeding, * * *. In ruling the question then before this court, the learned writer of that opinion, speaking for the court, said: 'I am inclined to think that the relators are wrong in respect to the supposed jurisdictional fact. The section makes it the duty of the directors to act, when ten qualified voters request them to do so, but it does not assume to prohibit them from acting of their own motion when the interests of the district, in their judgment, call for action. Their action terminates by posting a proposition for a change. The proposition so posted by them is the warrant of authority for the vote at the annual meeting, and not the preliminary request of the ten voters to submit the matter to a vote. If the preliminary request should be regarded in the nature of a jurisdictional fact, it is a fact which seems to be left to the directors to decide. It is for them to say that the petitioners are qualified voters; and when they have practically so declared by

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posting the proposition, I do not perceive how their decision can be successfully attacked in any collateral proceeding or by mandamus of the courts.' (Italics ours.)

"As we read the last-mentioned case, while this court therein ruled that the statute involved did not assume to prohibit the school directors from acting of their own motion, without the filing, by ten qualified voters of the district, of a petition requesting such action, nevertheless, the court in substance recognized the fact that the statute made it the duty of the school directors to act in the premises upon the filing of a proper petition calling for such action upon their part; in other words, this court inferentially, at least, considered and viewed the filing of a proper petition as a jurisdictional act calling for the judgment and decision of the directors upon the sufficiency of the petition so filed. Consequently, in our opinion, the cases cited by respondent in no sense negative the contention of relators herein."

In the case of Walker Reorganized School District R-4 v. Flint, 303 S.W. 2d 200, the Kansas City Court of Appeals had this to say:

"* * * Thus, the first step of the annexation proceeding as set out in the statute is 'the reception of a petition * * * signed by ten qualified voters of such district * * *'. For upon that act taking place the statute makes it mandatory for the board to call an election as provided therein * * *."

In State ex rel. Gault et al. v. Gill et al., 88 S.W. 628, a petition bearing the names of fifteen qualified voters was presented to the board of directors of a school district, requesting that an election be held for determining whether the district would be organized into a village school district. The board then ordered that an election be held and set the date for same. Some time later, but prior to the date set for the election, two members of the board of directors met and

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ordered that the notices posted announcing the election be withdrawn. Thereafter, on the date set for the election, twenty-six qualified voters and taxpayers met and held an election on the proposition and it was carried. Then the respondents were elected directors of the new district and within four days thereafter organized and began to function as the board of directors of the new school district. The Prosecuting Attorney of Jackson County then instituted quo warranto proceedings, at the relation of the two directors who had ordered that the notices announcing the election be withdrawn, to oust the respondents. The relators appealed from a judgment for defendants. In affirming the judgment the Supreme Court of Missouri, at page 630, said:

"Nor do we think the validity of that organization was at all affected or impaired by the action of Gault and Young on the 13th day of May, in ordering the notice of the election to be withdrawn and causing other notices to that effect to be posted. Upon receiving the petition of the fifteen qualified voters and taxpayers of the district, the law imposed upon the board of directors the purely ministerial duty of ordering an election and giving notice thereof in the manner prescribed by statute; in the performance of which duty they were invested with no discretion * * *."
(Emphasis added.)

Under the rulings in State ex rel. Fry v. Lee, Walker Reorganized School District R-4 v. Flint, and State ex rel. Gault et al. v. Gill et al., cited above, it must be held that jurisdiction attaches when the petition for annexation is filed, and when jurisdiction attaches it is retained until the voters take action at the election held pursuant to the petition and decide what action shall be taken.

It is the duty of the school board of a school district, when a petition for annexation is presented to it, to order a special meeting so that a vote may be taken on the annexation proposition. The school board has no choice but to order a special meeting when a proper petition is received. Therefore, in the situation outlined in your request, the school board is required by the provisions of Section 165.300, supra, to submit the first petition received by them to a vote at a special meeting called for that purpose.

Question 3.

Where two valid petitions have been received by the board

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of directors of a common school district, each calling for annexation to different consolidated school districts, and the first petition received by the board is submitted to the voters and defeated, does the board have to wait two years to submit the other proposition to the voters?

In an opinion dated August 2, 1954, written by Assistant Attorney General John W. English, to the Honorable John E. Downs, Prosecuting Attorney for Buchanan County, this department considered this very question. The conclusion was reached that when a special meeting for the annexation of an entire district is held, under the provisions of Section 165.300, RSMo 1949, such district may not hold another election under said section, whether for the annexation of the entire district or a part thereof, within two years from the date of such meeting. For your information we are enclosing herewith a copy of this opinion.

Question 4.

Where two valid petitions have been received by the board of directors of a common school district, each calling for annexation to different adjoining consolidated school districts, if the board submits one of the propositions to a meeting rather than at an election may the majority present vote to suspend or postpone the submission of the proposition for a formal vote?

The portions of Section 165.300, supra, that are pertinent to this question read as follows:

"1. * * * the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by Section 165.200; * * *

* * * * *

"4. The voting at said special school meeting or special election shall be by ballot, as provided for in section 165.267, in the case of common school districts, or as provided for in section 165.330 in the case of town, city or consolidated school districts, and the ballots shall be

"For annexation

"and

"Against annexation,

* * * * *

(Emphasis ours.)

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While the words "meeting" and "election" are often used synonymously, it is our opinion that the Legislature did not so intend in the portion of Section 165.300, supra, set out hereinabove. The section provides that the voting shall be by ballot, as provided for in Section 165.267, in the case of common school districts, or as provided for in Section 165.300 in the case of town, city or consolidated school districts.

Section 165.200, RSMo 1949, relates to the annual meeting for common school districts and provides that said meeting shall be held on the first Tuesday in April of each year commencing at two o'clock P.M. Section 165.267 referred to in Section 165.300, supra, also relates to common school districts and reads in part, as follows:

"Whenever it may be desired to organize a common school district or consolidated school district into a town or city school district, with special privileges granted under sections 165.263 to 165.373, the board of directors shall, upon the reception of a petition to that effect, and signed by ten qualified voters who are resident taxpayers of the district, submit the proposition at an annual or special meeting, giving notice of such meeting as provided by section 165.200. The order of business at such meeting shall be as follows:

"(1) To organize as a town or city school district, those voting for the organization shall have written or printed on their ballots 'For organization,' and those voting against the organization shall have written or printed on their ballots 'Against organization;' and each person desiring to vote shall advance to the front of the chairman and deposit his ballot in a box to be used for that purpose. When all present shall have voted, the chairman shall appoint two tellers, who shall call each ballot aloud and the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are for organization, the chairman shall call the next order of business."
(Emphasis ours.)

In view of the foregoing, it would appear that when the board of directors of a common school district receives a

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valid petition for annexation they are not vested with discretion as to whether to call a special meeting or special election for the purpose of submitting the proposition to a vote of the qualified voters living in the district. They are required by reason of the reference to Section 165.267 to call a special meeting and submit the proposition for a vote at the meeting. They have no authority to order the holding of a special election in connection with a petition for annexation.

It is our belief that the authority to call special election is given only to the board of directors of town, city or consolidated school districts since Section 165.330, which is referred to in Section 165.300, supra, provides for the holding of an election.

Therefore, the board of directors of the common school district mentioned in your request can only call a special meeting for the purpose of voting upon the annexation proposition. Thus, there is no possible way of distinguishing between a meeting and an election, as you suggested, by requesting whether the majority present may vote to suspend or postpone the submission of the annexation proposition for a formal vote if the board submits it to a meeting rather than an election. Likewise, as the only purpose for ordering a meeting under Section 165.300, supra, is to vote upon an annexation proposal, the only choice that may be given to the voter is that of voting for or against annexation.

The section provides that the voting shall be by ballot and the form and contents of the ballot are specifically set out. The language used in the statute makes it mandatory that the ballot follow the form prescribed therein. There is no provision whereby the voters may, at a specific meeting called under Section 165.300, supra, vote to suspend or delay submission of an annexation proposition to a formal vote of the qualified voters living in the district.

Therefore, it is our opinion that when a petition is received by the board of directors of a common school district requesting the holding of a special meeting to vote upon an annexation proposition, it is the duty of the board to call a special meeting for that purpose. There is no provision in the statute permitting the board to order a special election rather than a special meeting in that situation. At the special meeting, the annexation proposal contained in the petition must be submitted to a vote and the only choice given the voters is that of voting for or against annexation.

CONCLUSION

Therefore, it is the opinion of this department that:

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1. Common school districts, at a special meeting called to vote upon an annexation proposal, cannot vote to annex to either one or the other of two separate consolidated school districts at the same meeting.

2. Where more than one petition for annexation is presented to the board of directors of a common school district, it is their duty to submit the proposition contained in the first petition received by them to a vote at a special meeting called for that purpose.

3. When a special meeting for the annexation of an entire common school district to an adjoining consolidated school district, has been held under the provisions of Section 165.300, RSMo 1949, as amended, such district may not hold another special meeting under said section within two years from the date of such meeting.

4. The board of directors of a common school district upon receiving an annexation petition are required under the provisions of Section 165.300, RSMo 1949, as amended, to call a special meeting and submit the proposal to a vote at said meeting. They have no authority under the statute to call a special election. At the special meeting the majority of the qualified voters present may not vote to postpone or delay submission of the annexation proposition to a formal vote.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

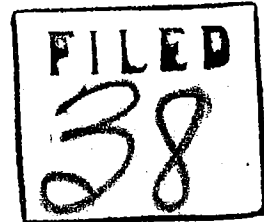
Yours very truly,

JOHN M. DALTON
Attorney General

CKH:lc;mc

INSURANCE: "Service certificate" described in opinion and purportedly issued by Shetley Funeral Home is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code ~~and~~ violates Sections 375.300 and 375.310, RSMo 1949.

July 17, 1959



Honorable Eugene S. Heitman
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

In reply to your recent inquiry, this opinion construes an instrument referred to as a "service certificate," purportedly issued to the public by Shetley Funeral Home, Lutesville, Missouri. The "service certificate" is examined with a view to determining if it is, in point of law, a contract of insurance, the issuance of which is subject to the provisions of Section 375.310, RSMo 1949, providing, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In order that no doubt will exist as to the written provisions of the "service certificate" being construed, it is here quoted in its entirety:

"COPY

"\$ 300.00

No. 14

KNOW ALL MEN BY THESE PRESENTS, that the,

SHETLEY FUNERAL HOME
Lutesville, Missouri

Party of the first part, has bargained and sold unto:

WILLIAM M. SHELTON

Honorable Eugene S. Heitman

"Party of the Second Part, together with the members of his family as follows:

Name	<u>William M. Shelton</u>	Age	<u>78</u>
	<u>Monthly</u>		
	<u>Quarterly payment</u>		<u>\$6.00</u>
Name		Age	
	<u>Quarterly payment</u>		
Name		Age	
	<u>Quarterly payment</u>		
Name		Age	
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Name		Age	
	<u>Quarterly payment</u>		
Name		Age	
	<u>Quarterly payment</u>		
Name		Age	
	<u>Quarterly payment</u>		

PRE-ARRANGED FUNERAL AND BURIAL SERVICE

Of the reasonable value of THREE HUNDRED-----
-----DOLLARS to be furnished and supplied by
First Party unto each of the persons named on
this certificate upon the decease of such per-
son; and that in consideration therefore, the
Second Party does agree to pay unto First Party
the aforementioned sum of \$ 300.00, payable
monthly in installments of \$6.00 each, the first
payment due and payable the first day of October
1953, and further like payments due and payable
upon each, the first day of each month in each
year hereafter, until the entire sum is paid.

That the Funeral and Burial service purchased
and evidenced by this certificate shall consist
of the following items:

1. Embalming and otherwise preparing the body for
burial.

Honorable Eugene S. Heitman

"2. Providing a casket and any necessary clothing, all as may be selected by relatives or friends in charge, within the limits of this agreement.

3. Providing a funeral coach without further charge within the limit of 50 miles from the mortuary.

4. To conduct and provide services incident to the funeral.

First parties also agree that the purchase of this service certificate does moreover entitle the holder to ambulance service for himself, and to any named member of his family to whom this service is properly to be rendered upon the written order or advice of a physician to the effect that such service is necessary or required; upon the condition however, that if the mileage driven on any one trip exceeds fifty miles, a reasonable charge shall be made for each mile over 50 necessarily traveled.

A grace period of not exceeding 30 days after due date will be allowed for the making of the payments required hereby, and failure to make the payments required will release First Party from any obligation under this sales agreement and payments received may be retained as liquidated damages.

SHETLEY FUNERAL HOME

By ss. Coy Shetley _ _ _ _ _"

The foregoing "service certificate" evidences an agreement between Shetley Funeral Home, as First Party, and William M. Shelton, as Second Party, with the former agreeing to perform services upon the decease of the latter, such services to be of the value of three hundred dollars. No provision is found in the agreement which would allow, or obligate, anyone other than the Second Party to make all payments under the agreement before the services would be rendered. Installment payments are fixed at six dollars monthly from October 1, 1953, "until the entire sum

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is paid." Orderly payment of installments will result in a paid-up "service certificate" after four years and two months. While the "service certificate" provides that "failure to make the payments required will release First Party," such provision is effective only during the life of the Second Party. The "service certificate" contains no language which would relieve the First Party from furnishing services to the full value of three hundred dollars upon decease of Second Party if no default in payment of installments was made prior to the death of the Second Party.

In *State ex rel. Inter-Insurance Auxiliary v. Revelle*, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of *Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas*, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In the case of *State ex inf. v. Black*, 145 S.W. (2d) 406, 347 Mo. 19, 1.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

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"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, 1.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C.Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as

Honorable Eugene S. Heitman

follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

In searching the "service certificate" for the "risk" element so essential to a contract of insurance, we find it in the following observation. Should the Second Party die prior to making all payments then due under the agreement, with no default in evidence, that which he will receive in services will not necessarily bear any true relationship in money value to the agreed value in money of the services promised and to be rendered by the First Party, and it is such circumstance which presents the tangible "risk" being insured by the First Party. The "risk" element would be absent from this "service certificate" if the estate of the Second Party, or other parties, were required to pay any unpaid installments falling due after the decease of the Second Party, and necessary to meet the total cost of three hundred dollars mentioned in the "service certificate." Absent such a provision in the "service certificate," the Shetley Funeral Home has insured a risk by promising to furnish services of a determined money value on the contingency of death without such valued services bearing any true relationship to the amount which may be paid to insure the performance of such services.

CONCLUSION

It is the opinion of this office that the within described "service certificate," purportedly issued by Shetley Funeral Home is a contract of insurance within the meaning of language contained in Section 375.310, RSMo 1949, and offering of such "service certificate" to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such "service certificate" to be subject to penalties prescribed by Section 375.300 and 375.310, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

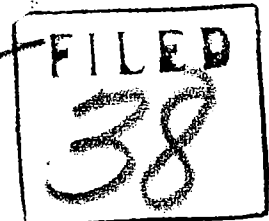
JLO'M:cm

COUNTY OFFICE HOURS: Under the terms of House Bill No. 534 of the 70th
SUPREME COURT RULES: General Assembly, truly agreed to and finally
COUNTY COURTS: passed, it is not within the power of the county
court of a third class county to authorize any
county offices to be open only five days a week.
Neither does House Bill No. 534 annul or amend

Rule 31.05 of the Rules of the Supreme Court of Missouri which states,
in effect, that the clerk's office of every court set forth in Article
V, Section 1 of the Constitution of Missouri, 1945, shall be open
during business hours on all days except Sundays and legal holidays
with the clerk or a deputy clerk in attendance.

September 23, 1959

Honorable Phil Hauck
Prosecuting Attorney
Grundy County
924 Main Street
Trenton, Missouri



Dear Mr. Hauck:

This is in response to your letter of August 11, 1959, which
we quote as follows:

"This request for an opinion is submitted on
behalf of the County Court of Grundy County,
Missouri.

"House Bill No. 534 repeals Section 49.265
R.S.Mo., 1957 Sup. That bill reads in part
as follows:

'And in all counties of classes three
and four by order entered of record,
may authorize all county offices, ex-
cept the Sheriff's office, to be open
not more than five and a half days
each week.'

"Under the terms of the above legislation,
is it within the power of a county court of
a third class to authorize all county of-
fices, except the Sheriff's office, to be
open only five days per week?"

We are enclosing two opinions written previously by this of-
fice, to Clinton Lindley, Nevada, Missouri, January 10, 1947,
which concludes that county officials were not authorized to close

Honorable Phil Hauck

and be absent from their offices during the reasonable business hours of the week as observed by the community, and to James G. Lauderdale, Lexington, Missouri, March 15, 1951. These opinions were written prior to the enactment of House Bill No. 534 of the 70th General Assembly, Truly Agreed to and Finally Passed. It is to be noted from the 1947 opinion that the authority did not rest with the county courts to close the various county offices at the will of those courts. Therefore, we believe that in enacting the present legislation the General Assembly considered the law as it existed previously.

We quote Section 49.265, Vernon's Annotated Missouri Statutes, July 1959 pamphlet, House Bill No. 534, 70th General Assembly, Truly Agreed to and Finally Passed:

"The county court in all counties of class two, by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five days each week, and in all counties of classes three and four by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five and one-half days each week. The county court, after entering such an order, may require any office to be open six days a week when public convenience requires. The authorization by the county court in counties of the third and fourth class to close such offices must be published three times in the county newspapers and such authorization to be signed by the county court."

(See amendments)

We are confronted with the situation in which by the creation of the various county offices it is a requirement of the laws of Missouri that these county offices remain open for business virtually every working day of the week. We now see that by House Bill No. 534, supra, the General Assembly of Missouri attempts to authorize the county court in all counties of classes three and four to authorize all county offices, except the sheriff's office, to be open not more than five and one-half days each week. We do not believe that this is an authorization to the county court to authorize county offices to be open less than five and one-half days each week. We believe that it would be inconsistent with the general law and with the reasonable requirements of our state business to assume that the Legislature intended by House Bill No. 534, supra, to authorize county courts to have complete control of

Honorable Phil Hauck

the business hours of the county offices. This is evidenced by the manner in which House Bill No. 534 was amended within the General Assembly prior to its final passage. In the perfected House Bill No. 534 the pertinent sentence reads as follows:

"The county court in all counties of classes two, three and four by order entered of record, may authorize all county offices, except the sheriff's office, to be open not more than five days each week."

Then by legislative procedures the bill was amended to its present form. Had the Legislature wished the county courts to have complete control of the business hours of the county offices it would have been of no significance that the authorized time be five days or five and one-half days or two days. The logical construction to be placed upon this legislation is that it is intended to be a specific authorization which only authorizes all county offices within a third and fourth class county, and excepting the sheriff's office, to be open not more than five and one-half days each week unless the county court deems that the public convenience requires those offices to be open six days a week.

However, we come to the question with respect to whether House Bill No. 534, supra, pertains to all offices within the county, aside from the sheriff's office.

Article V, Section 5, Constitution of Missouri, 1945, reads:

"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Rule 31.05, Rules of the Supreme Court of Missouri:

"The courts shall be deemed always open for the purpose of filing any pleading, motion, affidavit or other proper paper in every criminal case, of issuing and returning all mesne and final process therein, and making

Honorable Phil Hauck

and directing all interlocutory motions, orders and rules. The clerk's office of every court shall be open during business hours on all days except Sundays and legal holidays, with the clerk or a deputy clerk in attendance. All motions and applications filed in the clerk's office for issuing meane process and subpoenas for witnesses and for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court, under these Rules, are grantable as of course by the clerk; but his action when taken may be suspended, altered or rescinded by the court upon good cause shown." (Emphasis ours.)

You will note from Article V, Section 5, of the Constitution, supra, that the Supreme Court of Missouri is authorized to establish the rules of practice and procedure for all courts. Consistent with this rule, the Supreme Court of Missouri has promulgated Rule 31.05, supra, to the effect that the clerk's office of every court shall be open during business hours on all days except Sundays and legal holidays. It is also to be noted from Article V, Section 5, of the Constitution that any rule of the Supreme Court pertaining to practice and procedure may be annulled or amended by a law limited to the purpose.

We now wish to bring your attention to Article V, Section 1, which we quote:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

You will observe that Section 1, above, sets forth the courts in Missouri in which the judicial power of the state shall be vested. It would, of necessity, be these courts for which the Supreme Court is authorized to establish the rules of practice and procedure. Therefore, it is our opinion that Rule 31.05 applies to the offices of the clerks of the courts set forth in Article V, Section 1, supra. In the absence of any legislation which is limited to the purpose of annulling or amending Rule 31.05, it would appear that the offices of the clerks of the courts set forth in Article V, Section 1, supra, are not authorized to close except on Sundays and legal holidays.

It is the opinion of this office that House Bill No. 534,

Honorable Phil Hauck

supra, is not a law limited to the purpose of annulling or amending Supreme Court Rule 31.05. House Bill No. 534 does not mention the Supreme Court Rules. Neither does it specifically mention the offices to which the Supreme Court Rule has reference. This office believes that had it been the purpose of the Legislature to limit the law to the annulling or amending of Supreme Court Rule 31.05 it could and would have done so by reference to the rule or to the specific offices.

CONCLUSION

It is the opinion of this office that under the terms of House Bill No. 534 of the 70th General Assembly, truly agreed to and finally passed, it is not within the power of the county court of a third class county to authorize any county offices to be open only five days a week. Neither does House Bill No. 534 annul or amend Rule 31.05 of the Rules of the Supreme Court of Missouri which states, in effect, that the clerk's office of every court set forth in Article V, Section 1, of the Constitution of Missouri, 1945, shall be open during business hours on all days except Sundays and legal holidays with the clerk or a deputy clerk in attendance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

Enclosures (2)

JBS:mc

**ASSESSMENT OF
PROPERTY OWNERS:**

In fourth-class cities the cost of engineering services in a sanitary sewer project may not be added to the assessment against property owners.

June 8, 1959



Honorable W. D. Hibler, Jr.
Representative, Chariton County
House of Representatives
Jefferson City, Missouri

Dear Sir:

On April 2, 1959, you asked this department for an official opinion as follows:

"I have a request from my county engineer and the City of Brunswick to ask your office for a ruling.

"What they want to know is on sanitary sewer districts where the payment for sewers is handled by a special tax bill on a square foot basis, - can costs of engineering the project be included in the tax bill assessment.

"This would apply to cities of the third and fourth class."

Your question is: Whether to the actual cost of putting in sewers, which cost is upon an assessment basis against property benefited thereby, can be added the cost of the engineering services connected therewith.

We have ascertained that the City of Brunswick does not have a city engineer. Chariton County, in which the City of Brunswick is located, does have a County Surveyor and Highway Engineer, but it is not intended to employ him for the Brunswick job, for which it is the intention to employ an engineer who resides in Kahoka, Clark County, Missouri.

We have also ascertained that Brunswick is a city of the fourth class. We note that Section 88.717, V.A.M.S., gives the

Honorable W. D. Hibler, Jr.

board of aldermen of fourth class cities the power to cause a general sewer system to be established, which system shall be composed of three classes of sewers, to wit, public, district and private.

We also note numbered paragraph 2 of Section 88.720, V.A.M.S., which reads as follows:

"2. As soon as any district sewer shall have been completed the city engineer or other officer having charge of the work shall compute the whole cost thereof and shall apportion the same against the lots, tracts or parcels of ground, exclusive of the improvements, in proportion to the area of the whole district exclusive of public highways, and such officer shall report the same to the board of aldermen by bill or otherwise and the board of aldermen shall thereupon levy and assess a special tax by ordinance against each lot, tract or parcel of ground within the district in the name of the owner or owners thereof. Whereupon the city clerk shall make out a certified tax bill under the seal of the city of such assessment against each lot, tract or parcel of ground within the district in the name of the owner or the owners thereof. Said certified special tax bill shall be signed by the mayor and attested and recorded by the city clerk and shall be delivered to the contractor for the work, who shall proceed to collect the same by the ordinary process of the law in the name of the city to his own use and in case of absent owners he may sue by attachment or by any other process known to the law."

We note in the above-numbered paragraph 2 that the city engineer or other officer having charge of the work shall compute "the whole cost thereof and shall apportion the same against the lots, tracts or parcels of ground, * * *."

The language particularly indicated in the section would appear to be quite broad and inclusive but it is in general terms and would, therefore, we believe, be subject to limitation by

Honorable W. D. Hibler, Jr.

specific holdings on a particular point regarding such costs. A number of the Missouri Appellate Court opinions have ruled upon the precise point in issue adversely to adding the costs of engineering to the tax bills. In the case of *Walsh v. Bank*, 139 Mo. App. 641, l.c. 648, the Springfield Court of Appeals stated:

"The city had agreed to pay Burns & McDonnell for their services five per cent of the cost of construction, and this was added to the cost, and included in the taxbills. Some lots were omitted and no taxbills issued against them. These facts are now urged as reasons for annulling these taxbills. The commission of Burns & McDonnell should not have been included and the property-owners cannot be made to pay it. The plaintiff may also be relieved of the erroneous charge for lots omitted, but these things do not render the taxbills void [*Neenan v. Smith*, 60 Mo. 292; *First National Bank of Kansas City v. Arnoldia*, 63 Mo. 229; *Neill v. Ridge*, 119 S.W. 619; *Johnson v. Duer*, 115 Mo. 366.]."

It will be noted that a number of cases are cited by the courts in support of its position.

In the case of *City of Jackson, Missouri v. Houck*, 226 Mo. App. 835, at l.c. 844, the St. Louis Court of Appeals stated:

"It appears from the record that the contract price for the improvement was \$17,233.45 and it is admitted by the plaintiff that there was added to this \$838.18 for engineering expenses, which was five per cent of the contract price which plaintiff has expressed a willingness to deduct if found to be improper. Since the property owners were not liable for any amount in excess of the contract price it was improper to add to the tax bill the cost of the engineer's services in supervising the work. [*City of Boonville ex rel. v. Rogers*, 125 Mo. App. 142, 101

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S. W. 1120; Walsh v. Bank, 139 Mo. App. 1.c. 648, 123 S.W. 1001; City of Washington v. Mueller (Mo. App.), 287 S.W. 1.c. 861.] But under the cases cited the addition of this amount to the tax bill does not render the tax bill void but the same may be deducted from the amount thereof."

We believe that the above cases represent the law on this matter.

CONCLUSION

It is the opinion of this department that in fourth class cities the cost of engineering services in a sanitary sewer project may not be added to the assessment against property owners.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

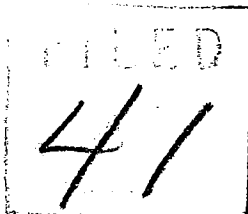
John M. Dalton
Attorney General

HPW:hw:gm

FOURTH CLASS CITIES:
EXPENSE ACCOUNTS:
CHARTER CITIES:

1. The City of Berkeley, as a city of the fourth class, was authorized to provide by ordinance a flat \$50.00 monthly automobile allowance for the city engineer.

2. If the successor to the city engineer has not been selected and qualified or the duties of such officer have not been otherwise provided for under the provisions of the 1957 Charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.



January 21, 1959

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your request for an opinion, January 12, 1959, which we quote as follows:

"In an audit of the records of the City of Berkeley, St. Louis County, Missouri, it was found that an ordinance, enacted by the board of aldermen, has given rise to questions upon which the opinion of your office is desired. The questions arise by reason of the following circumstances:

The City of Berkeley, while operating as a city of the fourth class, enacted an ordinance establishing the office of city engineer. By ordinance enacted in June, 1956, the board of aldermen appointed an individual to the position, and by the same ordinance fixed his compensation at \$7,200 per year 'plus \$50 monthly automobile expense allowance.' The person appointed by the board of aldermen assumed the office and received the compensation provided by ordinance, including the automobile expense allowance of \$50 per month.

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"In 1957, the City of Berkeley, pursuant to Section 19 of Article VI of the Constitution of Missouri, 1945, adopted a charter. Such charter provided for the office of director of public works who should serve as city engineer. The charter became effective in April, 1957, but the previously appointed city engineer continued to hold his office and to receive the \$50 monthly automobile expense allowance provided by the ordinance enacted in June, 1956, and previously referred to. Our questions are as follows:

1. Was the City of Berkeley, as a city of the fourth class, authorized to provide by such ordinance a flat \$50 monthly automobile allowance for the city engineer?

2. Did the adoption of a constitutional charter by the City of Berkeley affect the validity of the foregoing ordinance insofar as it provided for the payment of such \$50 monthly automobile expense allowance to the city engineer?

"A copy of the ordinance in question and of the charter adopted by the City of Berkeley is enclosed for your information."

It is the opinion of this office in answer to your first question that the City of Berkeley as a city of the fourth class was authorized to provide by ordinance a flat \$50.00 monthly automobile allowance for the city engineer.

Article VI, Section 15, of the Missouri Constitution of 1945, authorizes the provision for the organization and classification of cities and towns into classes by general law. We quote that section:

"The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all

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such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

You will then observe that Chapter 79 of the Revised Statutes of Missouri, 1949, is the statutory chapter providing for the organization of cities of the fourth class. We wish to quote Section 79.230:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner."

It would appear obvious that the city may provide for a city engineer, as did the City of Berkeley, in its Ordinance Number 847, Bill No. 861.

We now direct your attention to Section 79.270, authorizing the board of aldermen to fix the compensation of all the officers and members of the city by ordinance.

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Honorable Haskell Holman

Section 79.270 does not specifically refer to the term "expense account," but it is our belief that such an expense account would be within the term, "compensation," which the aldermen may provide. We believe that a part of the compensation may be denominated "automobile expense allowance," whether or not that denomination would be accurate when other financial and tax laws are brought to bear upon the sum so labeled.

We think that it is of little significance that a sum of money provided for by the ordinances of a city of the fourth class is labeled an expense account. Whether for income tax or other purposes the money provided for is to be considered, in fact, expense money, or just an additional sum of income, is not a subject of inquiry herein. It is not the label, such as "salary," or "expense account" which is given to the sum which has a bearing upon the authority for the enactment or provision for that sum, but it is solely a question of the authority for the city to provide for the city officials.

With respect to your second question, it is the opinion of this office that if the successor to the city engineer has not been selected and qualified under the provisions of the 1957 charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.

Article VI, Section 19, of the Constitution of Missouri of 1945, provides for city government by constitutional charter with authority to enact ordinances so long as they be consistent with and subject to the constitution and laws of the State of Missouri. We quote Article VI, Section 19, in part:

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state, in the following manner.
* * *

To amplify somewhat the constitutional provision, we wish to bring to your attention some cases. In the case of *Kansas City v. Frogge*, 176 S.W. 2d 501, Division No. 1 of the Supreme Court of Missouri stated:

"By the grant to plaintiff city of the right to frame and adopt a charter, the

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people of the state transferred or granted part of the legislative power of the state (subject to constitutional limitation in the grant, Section 16, Article IX) to the people of plaintiff city. The power so granted to the people of plaintiff city was the legislative power to frame and adopt a charter for its own government. *Norrow v. Kansas City*, supra. The people of a city which has been granted the right by the people of the state to frame and adopt a charter may not deem it desirable or needful to delegate under the charter of their city all of those powers which may be delegated by the legislature to cities organized under general law. So the powers which plaintiff city may exercise, through the constitutional grant of the right to frame and adopt a charter, are those powers which the people of the city delegate to it under its charter, if unrestrained by constitutional limitation."

Having established the authority for the charter for the City of Berkeley, we wish to study the provisions of the charter itself to the extent that they may affect Ordinance Number 847 as it was enacted prior to the adoption of the charter. Article V, Section 1, of the charter for the City of Berkeley, Missouri, effective April 4, 1957 is as follows:

"There shall be the following administrative departments: Finance, Police, Fire, Public Works, and such other departments as may be created by ordinance."

You will observe that this creates a department of public works. Section 6 of Article V, we quote in part:

"The Director of Public Works shall be a professional engineer, registered under the laws of the State of Missouri and qualified to perform the duties required of him by this Charter. He shall serve as City Engineer and shall have charge of: * * *."

Honorable Haskell Holman

From this Section 6, we find that the director of public works shall serve as city engineer. This would appear to abolish the office of city engineer in form as it was provided for in Ordinance Number 847.

Section 5 of the Schedule of the charter, page 45, is as follows:

"The Municipal Court Judge, City Clerk, Collector, all department heads, including the Chief of Police, Fire Chief, and City Engineer, and all members of administrative or advisory boards holding office at the time of the adoption of this Charter shall continue in office and in the performance of their duties until their successors shall be selected and qualified, or until the duties of their office shall be otherwise provided for in accordance with the provisions of this Charter."

We see that the city engineer is one of the officers who shall continue in office and in the performance of his duties until his successor shall be selected and qualified, or until the duties of his office shall be otherwise provided for in accordance with the provisions of this charter. Article XII, Section 1, would also permit Ordinance Number 847 to remain in force and effect so long as it is not inconsistent with the provisions of this charter.

"All ordinances, regulations and resolutions in force at the time this Charter takes effect which are not inconsistent with the provisions of this Charter, shall remain and be in force until altered, modified, or repealed by the Council."

If the office of the director of public works were to be created and the officer appointed as of the date of the adoption of the charter, we would believe it obvious that the office of city engineer, as created by Ordinance Number 847, would be inconsistent with the provisions of Article V creating the department of public works. However, Section 2 of Article V provides that the city manager shall appoint, supervise and control the directors of the administrative departments. This section provides no date before which the director

Honorable Haskell Holman

of these departments must be appointed.

"Each administrative department shall be under the supervision and control of a director appointed by the City Manager. Two or more departments may be headed by the same individual, and the City Manager may himself serve as director of one or more departments."

Therefore, it is the opinion of this office that, if the director of the department of public works has not been appointed Ordinance Number 847 remains in force, and the city engineer has properly continued in the performance of his duties, and the compensation provided for the city engineer is not invalid.

CONCLUSION

It is the opinion of this office that:

1. The City of Berkeley, as a city of the fourth class, was authorized to provide by ordinance a flat \$50.00 monthly automobile allowance for the city engineer.

2. If the successor to the city engineer has not been selected and qualified or the duties of such officer have not been otherwise provided for under the provisions of the 1957 Charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.

The foregoing opinion which I hereby approve was prepared by my Assistant, James B. Slusher.

Yours very truly,

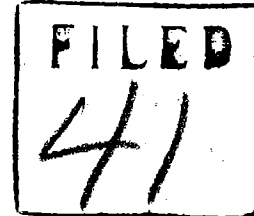
JOHN M. DALTON
Attorney General

JBS:mc

TAXATION: County court must procure and maintain on file the plats referred to in Section 137.195, RSMo 1949; county court may not supplant such plats by any other system. County Court may contract with the assessor to set up a card system as a permanent record in the assessor's office.

June 17, 1959

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri



Dear Mr. Holman:

Reference is made to your request for an official opinion, which request reads as follows:

"In the event the plats required in Section 137.195, R.S. Mo., 1949, to be procured by the county court from the United States land office, become soiled to the extent they are of no value to the assessor, would the county court have authority under the provisions of Section 137.200, R.S. Mo., 1949, or any other statutory provision to employ the assessor and pay compensation therefor from general revenue, to install a card system as a permanent record in the assessor's office to supplant the plats heretofore referred to? The information set out on the cards is the owner of real estate, description, valuation and transfers."

Section 137.195, R.S. Mo. 1949, to which you refer, provides as follows:

"Each county court of this state shall procure from the register of the United States land office and keep on file plats of all townships and parts of townships in their respective counties, showing the county lines on a scale sufficiently large to show the sections and parts of sections, by their legal subdivisions, and all lands subject to taxation at that time, and also all private land claims with the name of the original claimant, the number of the survey and the number of acres."

Honorable Haskell Holman

As relating to the same matter, we invite your attention also to the provisions of Sections 137.200, 137.205, and 137.210, RSMo 1949.

"137.200. In any county where land plats or maps have been lost or destroyed, the county court of such county shall procure others to supply the places of those so lost or destroyed; and where any county court fails to procure such maps or plats at least sixty days before the time for commencing the assessment in any year, it shall be the duty of the assessor of such county to procure them, to be paid for by the county."

"137.205. The assessor shall have free access to all land plats and maps during the time of assessment with a view to ascertain what lands are taxable; and upon the return of the assessor's books to the board of equalization, the said board shall compare the same with the plats and maps of the county; and in all cases where any lands have been omitted by the assessor, they shall be placed in the assessor's books and assessed as other lands are required to be assessed by this chapter."

"137.210. The assessor shall examine and compare the list of property delivered by individuals with the list of lands furnished by the secretary of state, and said plats and maps, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the real and tangible personal property in his county to be called the assessor's book."

We believe that it is eminently clear from the foregoing statutory provisions that it is the positive duty of the county court to procure and keep on file the plats referred to in order that the assessor and the county board of equalization might have access to the same for the purpose of listing, assessing,

Honorable Haskell Holman

and equalizing the property in the county subject to taxation. Indeed it is made the duty of the assessor to procure said plats and maps at the expense of the county where for any reason the county court fails to procure said plats and maps at least 60 days before the time for commencing the assessment in any year. See Section 137.200, supra.

We do not find any authority, statutory or otherwise, which would relieve the county court or the assessor from their duty to procure and keep on file the referred to plats and maps. Nor do we find any authority which would permit the county court to set up a card system such as you have described in lieu of said plats and maps.

Therefore, in partial answer to your inquiry, we conclude that the county court must procure and maintain on file the plats referred to in Section 137.195 and that the county court is not authorized by this or any other statutory provision to supplant the plats referred to by any other system.

While we are of the opinion that the county court cannot supplant the plats referred to in Section 137.195, we do not mean to say that the county court cannot, in its judgment and discretion, provide the office of the assessor with a permanent record card system such as you describe to facilitate the assessment of property subject to taxation.

This office issued an opinion to S. T. McIntyre, Assessor of Marion County, under date of May 14, 1934, holding that the county court in its discretion could contract with the assessor to index the assessor's book. The opinion further held that under such a contract the assessor would not in performing such a contract be acting in his official capacity but rather in his individual capacity. A copy of said opinion is enclosed herewith. As far as the legal principles involved are concerned, we see no difference between the authority of the county court to contract for indexing the assessor's book as determined in the McIntyre opinion and setting up a card system as a permanent record in the assessor's office. We, therefore, conclude that the various county courts can in the exercise of their discretion contract with the assessor in his individual capacity to set up a card system containing the name of the owner of real estate, the description, valuation, transfers, etc., as a permanent record in the assessor's office.

Honorable Haskell Holman

In further support of the conclusion herein reached, we invite your attention to the provisions of Section 137.395, RSMo 1949, which section authorizes and empowers the county court in counties of the first class by order to prescribe a method or system to facilitate the assessment of property for the purpose of taxation. We believe that a permanent card system such as you describe would be encompassed within the terms of this section relating to counties of the first class.

We further invite your attention to the provisions of Section 137.225, RSMo 1949, which provides in part as follows:

"* * *provided, that in counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in such county or designated part thereof or otherwise, and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury."

Referring to this provision, the appellate courts of this state have held that it clearly authorizes county courts in counties of more than 40,000 population to "adopt suitable and efficient means or agencies to procure an accurate assessment of all or any portion of taxable property in their counties and pay for such services out of the county treasury." *Hellman vs. St. Louis County*, 302 S.W.2d 911. See also *State ex rel. Tadlock vs. Mooneyham*, 212 Mo. App. 573, 253 S.W. 1098.

Since you do not specify in your opinion request any particular size or classification of county, we have undertaken herein to include all counties in the state regardless of size or classification.

Honorable Haskell Holman

CONCLUSION

It is, therefore, the opinion of this office that the county court must procure and maintain on file the plats referred to in Section 137.195, R. S. Mo. 1949, and the county court is not authorized by this or any other statutory provision to supplant the plats referred to by any other system.

We are further of the opinion that the county court, in order to facilitate the assessment of property for the purpose of taxation, may in its discretion contract with the assessor in his individual capacity to set up a card system containing the name of the owner of real estate, the description, valuation, transfers, and such other information as may be deemed pertinent, as a permanent record in the assessor's office with payments to be made from funds available in general revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:gn
Enclosure

MUNICIPAL COURTS:
COSTS:
POLICE JUDGE:

Rent for providing a suitable courtroom may not be assessed as a part of court costs in a municipal police court and paid to the police judge, by action of a city of the fourth class.

November 11, 1959

FILED

41

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your letter of August 3, 1959, which we quote:

"In an audit of the records of the City of St. Robert, Missouri, it was found that the cost assessed in police court for a violation of a city ordinance included a fee to the Police Judge, which has given rise to a question upon which the opinion of your office is desired.

"The question is as follows:

May room rent be assessed and paid to the Police Judge, by action of a city of the fourth class, as a part of court costs in a municipal police court?"

It is the opinion of this office that rent for providing a suitable courtroom may not be assessed as a part of court costs in a municipal police court and paid to the police judge, by action of a city of the fourth class.

In reaching our conclusion we would agree that it is a general statement of the law to say that costs are to be taxed in accordance with the provisions of the statutory law of a state. However, we do not feel that anything may be made the

Honorable Haskell Holman

subject of costs when it would be beyond the point of reason as well as statutory authority.

In the case of City of Carterville v. Cardwell, 152 Mo. App. Reports 32, at page 37 the Springfield Court of Appeals states that:

"* * * The word costs when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill."

The court also, at page 37, states:

"* * * Costs in criminal proceedings are those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense, as compensation to the officers for their services."

With the Carterville case, supra, in mind, it is our belief that rent for a suitable courtroom may not correctly be termed a service.

In the case of Gleckman v. United States, 80 F.2d 394, the Eighth Circuit Court of Appeals said, in referring to costs, l.c. 403:

"* * * It does not include the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government.
* * *"

Section 98.520, RSMo 1949, is as follows:

"The board of aldermen shall provide at the expense of the city a suitable room or office for the mayor or police judge, and he shall hold his court in such room, and his court shall be open every day except Sunday."

We feel that the phrase "expense of the city" means at the expense of all of the taxpayers of such a city. We believe that a provision for a courtroom as required by Section 98.520, supra, particularly considered with the statement of the Gleckman case, supra, is a provision for the maintenance of the

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system of courts and the administration of justice, all of which are to be considered an ordinary burden of the government.

CONCLUSION

It is the opinion of this office that rent for providing a suitable courtroom may not be assessed as a part of court costs in a municipal police court and paid to the police judge, by action of a city of the fourth class.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

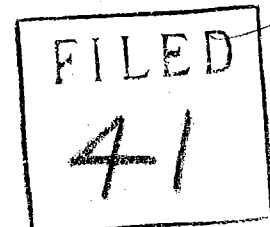
JOHN M. DALTON
Attorney General

JBS:mc

CITIES:
TOWNS: VILLAGES:
FOURTH CLASS CITIES:
CITY FINANCES:
TAXATION:
PUBLIC UTILITY
TAXATION:

A fourth class city is not required to separate funds received from the taxation of railroads and other public utilities from those received from other taxpayers for similar purposes. Only the method of assessment of property belonging to public utilities varies the collection of local taxes from the ordinary taxpayer.

November 11, 1959



Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This is in reply to your recent inquiry as to whether railroad and public utility taxes received by a fourth class city must be apportioned among the various funds according to the rates levied or whether such a city may merely credit funds from these sources to its general fund. Your inquiry reads:

"In a recent audit of the records of a city of the fourth class, it was found that the moneys received from Railroad and Utility taxes were placed to the credit of the general fund, although the total tax levy included levies authorized for general municipal purposes, Health and Welfare, Park, Sewer Bonds and City Hall and Fire Department. Therefore, since the provisions of Section 151.120, Revised Statutes of Missouri, provide, among other things, that it shall be the duty of each city to certify to the County Court a statement of the rate per cent levied by the city, prerequisite to the levying of taxes on railroad properties, the placing of Railroad and Utility tax moneys to the credit of the general fund has given rise to a question upon which the opinion of your office is desired.

"The question is as follows:

"Is it permissible for a city of the fourth class to place all of the moneys received from Railroad and Utility taxes to the credit of the general fund, or must the money received from such source

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be apportioned to the various funds according to the tax rates levied for such purposes?"

By the provisions of Chapter 153, RSMo 1949, taxes on bridges, express companies, and public utilities are taxed in the same manner as railroad companies. Accordingly, we shall analyze the manner in which railroads are taxed as provided in Chapter 151, RSMo 1949.

Valuation and assessment of the properties of these enterprises is divided into two categories, distributable property and local property. Thus, properties subject to purely local taxation are found in Section 151.100 RSMo 1949. This section reads:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, and not herein specified, owned or controlled by any railroad company or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provision of this chapter."

By the terms of Section 151.120, RSMo Cum. Supp. 1957, after assessment of this local property by local authorities, a statement of the assessment is certified to the county court together with the rates to be applied to such property.

An excellent discussion of the method in which distributable property of public utilities is assessed is found in State ex rel. and to the use of Hatten, vs. Kansas City Power and Light Co., 365 Mo. 296, 281 SW2d 784, 1.c. 786 and 787:

"The law governing the taxation of railroad property which is thus made applicable to power and light companies is to be found in Chap. 151, §§151.010 to 151.340. These statutes have been construed as dividing the property of such companies into two classes, distributable and local. Distributable property (with which alone we are presently

Honorable Haskell Holman

concerned) is to be assessed and valued as a whole, and the aggregate value allocated to certain taxing subdivisions on a wire or track mileage basis, and the local property to be assessed by the local assessor of the taxing subdivision in which such property is located. State ex rel. Hayes v. Hannibal & St. J. Ry. Co., 135 Mo. 618, 37 SW 532; State ex rel. Spratt v. Chicago, R.I. & P. Ry. Co., 162 Mo. 391, 63 SW 495; State ex rel. Union Electric Light & Power Co. v. Baker, 316 Mo. 853, 293 SW 399. Section 151.020 provides in substance that the president or other authorized officer of a railroad company shall furnish to the state tax commission annually a sworn statement setting out in detail certain information with respect to the distributable property owned by it 'in each county, municipal township, incorporated city, town or village through or in which it is located in this state.' Under §151.060 the state tax commission is required to assess, adjust and equalize the aggregate value of the property specified in §151.020. Under §151.080 the aggregate value of all such property is apportioned or allocated by the tax commission to certain local taxing subdivisions according to the ratio that the pole mileage in such subdivision (in the case of power and light companies, or trackage in the case of railroads) bears to the whole length of the pole mileage (or trackage) in this state.

"The tax commission is required to keep a record of its proceedings, and to certify its action to the county court setting forth certain information with respect to distributable property owned by each railroad (or power and light company) in the state, and the value thereof per mile and its total length 'in each county, city, town, village and municipal township;' also the total values 'assessed, adjusted, equalized, and apportioned to such county, city, town, village and municipal township therein by said commission.'

"Section 151.140, in relation to levying the tax,

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provides that the 'county court, upon receipt from the state tax commission* * *shall* * * ascertain and levy the taxes for state, county, municipal township, city, incorporated town and village and school purposes * * * and for other purposes on the railroad and the property thereof, in such county, municipal township, city and incorporated town or village, at the same rate,' etc."

As pointed out on the court's discussion, the county court, by the terms of Section 151.140, RSMo Cum. Supp. 1957, applies the same rate of taxation of both local and distributable property of public utilities, according to the rates furnished by the various taxing authorities within the county. The county clerk, by the terms of Section 151.170, RSMo Cum. Supp. 1957, makes a separate tax book for these taxes, showing separately the distributable and local property, together with the rates applied thereon. By Section 151.190, RSMo Cum. Supp. 1957, the county clerk forwards a statement of these taxes to the railroad or public utility being taxed. Section 151.200, RSMo Cum. Supp. 1957, provides that these taxes must be paid to the county collector on November 1 of the year in which these were levied.

After collection, Section 156.260, RSMo 1949, provides that the county collector pays the county taxes into the county treasury and the city taxes into the treasury of such city. This act then goes on to say that "amounts paid into the county and city treasury shall be dispersed as provided by law."

There are no further provisions within the railroad and utility tax laws as to what must be done with these funds once they are received by the local taxing authority. One also searches in vain the laws pertaining to financial administration in fourth class cities for any requirement that these funds once received by the taxing authority, must be treated differently or kept separate from those received from other tax payers for similar taxes.

CONCLUSION

Therefore, it is the conclusion of this office that a fourth class city is not required by the statutes regulating its financial affairs, nor by the laws pertaining to the taxation of railroads and other public utilities, to segregate taxes received from railroads and other public utilities. Taxes received from all public utilities are to be proportioned to the various city funds and paid out in the same manner as taxes received from individuals.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

SCHOOL LANDS: The provisions of Sec. 166.050, RSMo, as to
SALE OF SCHOOL LANDS: sale of school lands in the sixteenth sec-
tions of each congressional township are
COUNTY COURTS: mandatory if there is no statutory exception
applicable, consequently requiring a petition
by the majority of the householders in the
congressional township wherein the land is lo-
cated. The county court where the land is situ-
ated holds the proceeds of such sale until
requisition of that portion of the proceeds
belonging to the adjoining county or counties
by that county or counties.



May 15, 1959

Honorable John Hosmer
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Hosmer:

This is in reply to your letter of February 12, 1959,
requesting an opinion concerning the sale of public school
lands in Section 16, Township 30, Range 16, Webster County,
Missouri.

It is our understanding from your letter and previous
correspondence concerning the matter, that this township
is evenly divided, eighteen sections of which are in Web-
ster County, and eighteen of which are in Wright County.
We also presume from your letter that the Section 16 in
question lies wholly within Webster County.

From this fact situation we have phrased three ques-
tions for consideration, the answers to which seem to de-
termine the applicable handling of the situation presented
by your letter. These questions are:

1. Who may authorize sale of public
school lands within Section 16, in
a congressional township, the sec-
tion set aside by Act of Admission
for school lands?
2. Who conducts the sale of such
lands?
3. How are the proceeds of such sale
to be handled?

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By-passing for the moment application of the Missouri Constitution of 1945, to the situation at hand, we shall consider first the applicable statutes governing the sale of these lands as found in Chapter 166 of the Missouri Statutes of 1949.

Section 166.050, RSMo 1949, is the basic section authorizing sale of such school lands, and the sections immediately following that provision elaborate the means by which this sale is to be carried out.

Section 166.050, RSMo, reads in full as follows:

"In all congressional townships in this state in which there are fifteen householders, they shall have the right to sell their sixteenth sections, or such lands as have been or shall be selected in lieu thereof; and upon a petition of a majority of such householders, the county court shall make an order, a copy of which shall be furnished the sheriff, directing him to expose such lands to sale at the courthouse door, and while the circuit court of the county is in session, after giving twenty days' notice thereof; provided, that in any fractional township in this state wherein less than fifteen householders now or shall hereafter reside, a majority of the householders of such fractional township may petition the county court for an order to sell the sixteenth section in such township, or other lands which have been or shall be selected in lieu thereof, in like manner as herein provided."

Note that there are two factors which make this statute applicable; the congressional township containing over fifteen householders and, secondly, that the sale be conducted by the county court in response to a petition by a "majority of such householders." Likewise, note that nowhere does this section refer to a majority of house-

Honorable John Hosmer

holders living within the county, but only refers to a majority of householders living within the congressional township.

Congressional townships are defined in 52 Am. Jur., Towns and Townships, Section 2, page 474, which we quote in part, as follows:

"In most of the western states the term 'township' is used to denote a territory 6 miles square surveyed by the government for the purpose of entry and sale. These are called 'congressional townships.' * * *."

Missouri adheres to this definition. See *Doddridge v. Patterson, et al.*, 222 Mo. 146, 127 S.W. 72, 1. c. 75, wherein our court said:

"* * * A congressional township is six miles square and contains thirty-six sections of land, * * *."

These definitions of congressional townships would clearly encompass those township citizens residing in Wright County.

Section 166.200, RSMo, Cum. Supp. 1957, provides that under certain circumstances governing boards of school districts may sell such lands. In part, this section reads:

"1. Whenever it is found that, because of extensive prairies, unoccupied lands or other local causes, the provisions of section 166.050 cannot be carried into effect, then any of the lands selected, appropriated and granted to the state of Missouri under the provisions of the Act of Congress of the 20th day of May, 1826, entitled 'An Act to appropriate Lands for the support of Schools in certain townships and fractional townships not before Provided For' and known as sixteenth section school lands, may be sold and

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conveyed by the governing board of the school district for whose benefit such sixteenth section school land is held, in the manner now or hereafter provided by law for the sale by such boards of property owned by the school district and no longer required for school purposes. The deeds of conveyance shall be executed by the president of the board of education, signed by him, with the seal of the school district attached thereto and attested by the district clerk or secretary of said board and if such district has a seal, such seal shall be affixed." (Emphasis ours)

By its own terms this provision excludes its own operation unless, for the reasons enumerated, Section 166.050, RSMo 1949, "cannot" be carried into effect. The word cannot has been defined in DiBenedetto v. DiRocco et ux., 372 Pa. 302, 93 Atl. 2d 474, 1.c.475, as follows:

"The determinative crucial word in that regard is 'cannot.' 'Cannot' connotes, not unwillingness, but inability."

Inability, and only inability, to follow Section 166.-050, RSMo, for the reasons enumerated in Section 166.200, RSMo, Cum. Supp. 1957, can the latter section be invoked. From the circumstances set out in your letters it appears, then, that the sale procedure to be followed is that set forth in Section 166.050, i.e., petition of a majority of the householders within the congressional township.

After such a petition has been submitted, Section 166.050, RSMo, directs the county court to make the order of sale and provides for notice of sale. Other sections immediately following this provision impose additional requirements as to the sale of these lands. By the terms of Section 166.060, RSMo, the sale is to be conducted in the same manner as other judicial sales. Section 166.070, RSMo 1949, provides that the sheriff shall conduct the sale and establishes minimum sale price for such land, together with provisions for expense of sale; by Section 166.080, RSMo,

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these lands may be sold once yearly; Section 166.090, provides that sale is to be by forty acre tracts or, if the situation is applicable, to lay out town lots; other subsequent sections provide provision for payment perfection of title, compensation of county officers, etc., which provisions are not here pertinent.

After the sale has been conducted, in compliance with the applicable provisions governing sale of such lands, as found in Chapter 166, we next consider how the proceeds of the sale are to be handled. Basic to the consideration of this question is the Missouri Constitution of 1945, Section 7 of Article IX, which reads in part as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund.
* * *" (underscored emphasis ours)

This provision has been interpreted by our Supreme Court as abolishing the former township school fund or, in effect, merging these funds with the county school fund. In interpreting the question of disposition of township school funds, in relation to Section 7 of Article IX of the Missouri Constitution of 1945, our Supreme Court, sitting en banc, without dissent, and speaking through Justice Hollingsworth, said, in *State v. Davis*, 361 Mo. 730, 236 S. W. 2d 301, 1.c. 304:

"[1] More to the point, however, is the wording of the constitutional provision itself. After directing the liquidation of all township and county school funds and prescribing the method of reinvestment thereof, it further provides that

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they shall be sacredly preserved as a county school fund. There can be no doubt of the meaning of that provision. Township and county school funds are thereby merged into one fund, to-wit: a county school fund. So, therefore, when the investments belonging to the county and township school funds of Callaway County were liquidated, in accordance with the constitutional mandate, they became a county school fund. It is unthinkable that when the electors elected to have this county school fund distributed annually, it would again amoeba-like divide into township funds and a county fund so as to require township funds to be distributed on a township basis and the county fund on a county basis. The further wording of the provision states specifically otherwise. It says: 'All interest accruing from investment of the county school fund * * * shall be distributed annually to the schools of the several counties * * *' Thus, after liquidation of the formerly separate and distinct county school fund and township school funds, both the proceeds of principal and the accruing interest become one fund, namely: the county school fund." (Emphasis by the Court)

Provisions applicable to the disposition of school funds are found in Chapter 171 of the Revised Statutes of Missouri, 1949. In general, these provisions are set up to provide for a separation of funds derived from township school lands from those of the regular county school funds, that is, a separation of funds until such time as they are merged with or become a part of the county school fund as noted in State v. Davis, quoted supra. Most germane to the question of apportionment between two counties, where the congressional township is divided among two or more counties, is Section 171.180, RSMo, which reads:

"Whenever any congressional township shall lie in two or more counties, the township school fund of such township shall be divided among the aforesaid counties in proportion to the amount

Honorable John Hosmer

of territory in the fractional township included in each county, as follows: The county court of the county in which section sixteen is located shall, upon a requisition of the county clerk of any county containing a fractional part of such township, issue an order transferring the amount due such county under this section into the care, keeping and custody of the county court thereof; and said fund shall be loaned, and the income derived therefrom shall be apportioned, annually, to such fractional township as though it were an entire township; and the township funds of all entire townships and all fractional townships included within the limits of any county in this state shall be handled and controlled by the proper offices of such county, as set forth in this chapter. The provisions of this section shall not apply to any congressional township intersected by the Missouri river."

This indicates that Webster County, after the sale has been conducted, would hold the proceeds of the sale until such time as the Wright County clerk requisitioned the portion of the proceeds going to that county.

CONCLUSION

Therefore, it is the conclusion of this office that the provisions of Section 166.050, RSMo 1949, as to sale of school lands in the sixteenth sections of each congressional township are mandatory if there is no statutory exception applicable, consequently requiring a petition by the majority of the householders in the congressional township wherein the land is located. The sheriff of the county wherein the land is located conducts the sale of the said school lands under the auspices of the county court in the county wherein the land is located. The county court, where the land is sold, holds the proceeds of the sale until requisitioned by the adjoining county

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wherein a portion of such congressional township lands are located, and the portion of the proceeds of the sale belonging to that county are thereafter transferred to that county.

The foregoing opinion, which I hereby approve, was prepared by my assistant J. B. Buxton.

Very truly yours,

John M. Dalton
Attorney General

JBB:lc

COUNTY OFFICERS: A county officer may purchase at a tax
TAX SALES: sale unless he is charged with conduct-
ing the sale. Such an ineligible of-
ficer may not purchase, indirectly,
through a relative or other person what
he may not purchase directly. When a
spouse of an ineligible officer purchases,
the ineligible officer has an interest in
the property and the sale is void. Other
relatives of such officers may purchase at
such sales, in the absence of fraud, col-
lusion or interest in or for the purpose
of transferring to the ineligible officer.

August 3, 1959

Honorable John Hosmer
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Mr. Hosmer:

On July 10, 1959, we wrote to you answering an inquiry posed by you as requested by your county collector, Mr. Glenn H. Ventling, as to whether publication costs of tax sales were to be prorated according to the lands sold. At that time we reserved answer to your second question pending further study of all factors involved. This question reads as follows:

"2. It was my understanding at our collectors meeting that no county officer is allowed to bid on property at a tax sale. To what extent does this include said officer's wife or other relative? And what should my position be if such individual does bid at said sale? I have had inquiries which cause me to need an answer to the above."

Our understanding of the Missouri law applicable to tax sales is that there is no statutory prohibition, as such, against county officers bidding at tax sales. In the absence of collusion, fraud or unfair advantage being taken by a county officer or officers they may bid at tax sales. There is, however, a common law prohibition imposed by the courts against county officers, as such, being both seller and buyer, i. e., those officers active in the conduct of the sale buying the property themselves.

In *Walcott v. Hand*, 122 Mo. 621, 27 S.W. 331, 1. c. 333, our Court, in speaking of the collector who did not at that

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time conduct the sale, phrased this prohibition in the following language:

"The learned counsel for plaintiffs urges, with great earnestness, that the tax deed by the sheriff to the tax collector, Million, is void because it is against public policy to permit a tax collector to purchase at an execution sale under a judgment obtained by him for taxes. Counsel correctly assumes that a public officer charged with the duty of selling property for the best price cannot himself become the purchaser, and that a sale made by an agent or trustee to himself will not be sustained by the courts. These salutary and fundamental principles are not controverted by counsel for defendant, but he insists that both reason and the authorities distinguish between a sale by a tax collector to himself and a sale to him by a sheriff made under a judgment and execution of the circuit court; that, after the execution came to the hands of the sheriff, the sheriff, and not the collector, was charged with its execution and the responsibility attending the sale. It will be observed that counsel present the naked proposition that a purchase by the collector at the sheriff's sale is void. No collusion or conspiracy is charged, no suggestion is made of unfairness or irregularity in the time or manner of sale, or inadequacy of the bid. A careful examination of each and every case cited by plaintiffs, discloses that in every instance in which the sale was held void or voidable it was under a tax law in which the collector himself made the sale, and either by himself or deputy purchased the land, or, if sold by a sheriff or constable, he purchased at his own

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sale. The great underlying principle in all of these cases is that the duty of the seller is inconsistent with the interest of the purchaser, and when there is such a conflict the temptation is too great to subordinate the former to the latter, and public policy forbids the transaction; but under the tax law of 1877, and subsequent amendments, sales of lands for taxes in Missouri are made under judgments of the circuit courts, and executions issued thereon to the sheriffs as under other judgments. The sheriff, and not the collector, is charged by law with the execution of the process. He advertises and conducts the sale, and the collector has no control of the process, other than to stop the sale if the owner shall pay the taxes and costs. The cases cited from other jurisdictions whose proceedings were wholly unlike ours throw no light upon the subject further than to illustrate the general principle that an agent cannot be both seller and buyer. * * *

Chapter 140, Sections 140.010 through 140.720, RSMo 1949, colloquially known as the Jones Munger Law, regulates the sale of land for delinquent taxes. Section 140.190, RSMo, provides that the county collector is to conduct the selling of lands sold for delinquent taxes. Accordingly, the collector in such instance is in the position of a "seller;" he could not, therefore, be a purchaser also. We quote Section 140.190, RSMo, in part:

"1. On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, or chargeable to such person

Honorable John Hosmer

in said county. * * *

For your information on this point we are enclosing our opinion of November 30, 1937, to the Honorable G. Logan Marr, which holds that collectors or their deputies are prohibited from purchasing land sold for delinquent taxes.

As to relatives of an officer prohibited by law from purchasing, who bid or purchase at a tax sale, the cardinal rule is that a disqualified person is precluded from purchasing indirectly what he is denied the right, by law, to purchase himself. The law may not be circumvented by the simple expedient of having someone else purchase it for him.

In 85 C.J.S., Taxation, Section 809(j), page 143, the rule is stated as follows:

"A person will not be allowed to acquire a valid title to land sold at a tax sale by procuring another person to figure as the ostensible purchaser at the sale and then taking an assignment of the certificate or a deed from such person on refunding him the money expended when such person is legally or morally obligated to pay the taxes or disqualified by reason of his duty to the owner, or his relation to the title, or his character as a public officer, as discussed supra subdivision 1 of this section. Likewise, such person may not acquire a valid title by purchasing the property from a third person or stranger, who purchased it at the tax sale, even after expiration of the period of redemption.
* * * (Emphasis ours)

This rule is followed in Missouri. In Shotwell v. Munroe, 42 Mo. App. 669, 1. c. 678, 679, it is stated:

"The statute provides (R.S. 1879, sec. 2387; R.S. 1889, sec 4949): 'No officer to whom any execution shall be directed, or any of his deputies, or any person for them, shall purchase

Honorable John Hosmer

any goods or chattels, real estate or other effects, or bid at any sale made by virtue of such execution, and all purchases so made shall be void.' This provision is reiterated in the act relating to justices (R.S. 1879, sec. 3021; R.S. 1889, sec. 6309), where the words used are absolutely void. These provisions are merely declaratory of the common law, resting on the soundest principles of public policy, which prohibit any trustee from becoming directly or indirectly interested in a sale made by him. * * * * (Emphasis ours).

It is apparent that such an officer may not secure an agent or family member to purchase for him at a tax sale, but there remains a question of a family member purchasing at a public tax sale, not for the purpose of transferring the property to the ineligible officer but for the purpose of retaining the property themselves. This is a state sponsored sale to raise tax revenue when other means of collection fail. The state provides rigid rules of procedure as to the conduct of such sales, i.e., publication, etc., which must be strictly met. It has imposed no prohibition, by statute, on relatives of such officers bidding, but the law looks with close scrutiny on such purchases, not in that the purchaser is ineligible but from the standpoint of an ineligible officer having an interest by their relatives' purchase.

With purchases by spouses of ineligible officers the scrutiny is particularly close, and the general rule seems to be that they may not purchase at tax sales unless there is a clear showing that the property is clearly free of community of ownership with the ineligible officer spouse. Where a spouse purchases at a public tax sale, it has been held that the spouse's purchase is valid. See Means v. Haley, 84 Miss. 550, 36 So. 257, 86 Miss. 557, 38 So. 506, 1. c. 38 So. 507, wherein the court states:

"Nor do we think a sale for taxes, legally made, is invalidated simply because the purchaser is the wife of the tax collector who conducts the sale - especially when there is neither averment nor proof of

Honorable John Hosmer

irregularity or actual fraud. Husband and wife are separate in property, and may invest their money according to the dictates of their individual judgments."

Where a state has enacted provisions granting marital rights as broad as are contained in the Missouri Probate Code, it is doubtful that the spouse can't be said to have an interest in the property purchased by his spouse. As an example of this contention we quote, in part, our so-called forced share statute, Section 474.160, RSMo Cum. Supp. 1957:

"1. When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated:

"(1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and the allowance under section 474.260 one-half of the estate, subject to the payment of claims, if there are no lineal descendants of the testator; or, if there are lineal descendants of the testator, the surviving spouse shall receive one-third of the estate, subject to the payment of claims; "

The conclusions expressed relating to ineligibility of a spouse to purchase was the view taken by our Supreme Court in Githens v. Butler County, 350 Mo. 295, 165 S.W. 2d 650, 1. c. 652, 653:

"The cases cited in the preceding paragraphs deal with instances of an official being 'directly' interested in the contracts, actions or dealings with the public body of which he was a member. Here the question is whether the public official is so 'indirectly' interested as a party to a transaction with a county court of which he was a member as to invalidate it. In fact the

Honorable John Hosmer

question is whether the relationship of husband and wife is a disqualifying interest within the meaning of the statute and common law prohibition against an official's becoming indirectly interested in a public contract. The two opposing lines of cases are collected in the following: Thompson v. School Dist.No. 1, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 792; O'Neill v. Auburn, 76 Wash. 207, 135 P.1000, 50 L.R.A., N.S., 1140; 6 Williston, Contracts, p. 4898.

"[4] An indirect interest may be so remote as to not avoid a bargain between an official and the public body he represents, consequently when the interest is not direct there is more reason for considering each case on its special facts. 6 Williston, Contracts, § 1735; Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 790.

"[5-7] Here the respondent urges that she purchased the land in question with her own separate funds and that under our statute her husband cannot interfere with her separate real property. § 3390, R.S.Mo. 1939, Mo.R.S.A. § 3390. But the husband is under a duty to and is liable for his wife's support (Nielsen v. Richards, 75 Cal.App. 680, 243 P.697) and in this state he is entitled to dower in his wife's real estate, Mo.R.S.A. §§ 319,324, either of which are pecuniary interests and disqualifying under statutes requiring such an interest even though it is indirect. Nuckols v. Lyle, 8 Idaho 589, 70 P.401; Beakley v. City of Bremerton, 5 Wash.2d 670, 105 P. 2d 40. Though the husband may have no present interest in his wife's separate estate there can be no question but that because of the relationship he does have such a beneficial interest in her property and affairs as to be 'indirectly' interested in any contract to which she is a party. Clark v. Utah Con-

Honorable John Hosmer

struction Co., 51 Idaho 587, 8 P.2d 454. But aside from these pecuniary reasons it is obvious, it seems to us, that a county judge's wife may not purchase real estate from the county and court of which her husband is a member acting in a quasi-judicial capacity. Though the bargain may be ever so fair it places the officer in a position which might become antagonistic to his public duty. Throop, Public Officers, § 607; 22 R.C.L., § 121; Goodyear v. Brown, 155 Pa. 514, 26 A. 365, 20 L.R.A. 838, 35 Am.St.Rep. 903. Under most circumstances, if not all, it is simply against public policy for the wife of a county judge to purchase land from a county when the sale requires the vote and opinion of her husband as a member of the court passing on the transaction. Clark v. Utah Construction Co., supra; Sturr v. Elmer, 75 N.J.L. 443, 67 A. 1059."

A child, on the other hand, may be completely disinherited. Children may purchase property at such a sale, retaining the property for their own use and enjoyment or for their own family, i.e., to own separately from the ineligible officer parent. Providing that a child of the ineligible officer purchases at a sale meeting the legal requirements for a tax sale, and absent collusion or fraud in connection with that sale or, of course, a transfer of interest to the ineligible parent, we can find nothing either by statute or court decision to indicate that such a purchase would not be valid.

CONCLUSION

Therefore, it is the conclusion of this office that in the absence of collusion or fraud in the conduct of a tax sale, county officers may bid or purchase at a sale if they are not charged with the duty of conducting the tax sale. Such an ineligible officer may not purchase at a tax sale, indirectly, by procuring someone else to bid and purchase the property for him. A spouse of the ineligible officer may not purchase and retain property at tax sales in their own name, as it does not avoid the prohibition of the ineligible officer having an interest in the property. Other family members, in the absence of fraud or collusion, may purchase at tax sales so long as it is not

Honorable John Hosmer

purchased for or re-transferred to the ineligible county officer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. B. Buxton.

Very truly yours,

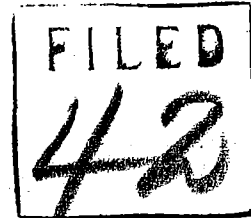
John M. Dalton
Attorney General

JBB:lc

1 enclosure

ST. LOUIS COUNTY LICENSING: The authority given to St. Louis County, a county of the first class, to require licenses upon the businesses itemized in Section 316.040, RSMo Cum. Supp. 1957, includes those businesses which are located within incorporated areas in the county.

September 21, 1959



Honorable Raymond B. Hopfinger
Senator, Fourteenth District
5916 Berkeley Drive
Berkeley 21, Missouri

Dear Senator:

Your recent request for an official opinion reads:

"The question has arisen in St. Louis County as to the authority of St. Louis County to tax, pursuant to R. S. of Missouri 316.040, 1949 businesses which are located within incorporated areas in the County.

I would appreciate an opinion from your office as to whether or not St. Louis County has this authority."

Section 316.040, RSMo 1949, to which you refer, was amended by the Laws of 1957 and now appears as Section 316.040, RSMo Cum. Supp. 1957. This section is quite lengthy and very largely consists of an itemization of various operations such as skating rinks, professional athletic exhibitions, dance halls, theater or motion picture theaters, miniature golf courses and many other businesses. It states that the county court of all counties of class one shall have the power to license such places and that it shall be unlawful for any person to operate any of the businesses itemized without taking out such a license.

Your question seems to be whether the power of the county court to license such businesses is restricted to licensing such businesses as are not located in an incorporated area. In other words, if one of the businesses itemized in Section 316.040 is within the bounds of a municipal corporation in St. Louis County, does this mean that it cannot be taxed by St. Louis County regardless of whether it is taxed by the municipality within which it is located or whether it is not.

Honorable Raymond B. Hopfinger

We would first note that there is nothing whatever in Section 316.040, supra, which would indicate that it was to be restricted in its application in any such manner. On the contrary, the plain meaning of the section is that it is applicable to all businesses itemized in it which operate within the county regardless of whether they are within an incorporated area. In the absence of any such restriction, we believe that the section is applicable to all such businesses operated within the county.

We noted above that Section 316.040, supra, authorized the "county court" of all counties of class one to license certain operations within their counties. We also take note of the fact that St. Louis County has adopted a charter and that the governing body, instead of being a county court, is a county council. In that connection, we particularly note Section 6 of Article III of this aforesaid charter which reads:

"The governing body of the County shall be the County Council which, except as otherwise provided in this charter, shall have and exercise all the powers and duties vested in counties and county governing bodies by the Constitution and laws of the State of Missouri and by this charter. All legislative power of the County shall be vested in the Council."

We also note Chapter 803 of the Ordinances. Section 803.010 reads:

"There is levied upon certain shows, professional performances, amusement facilities and devices, which are more particularly described by classification, a license tax, in an amount as set forth by classes in the following schedules: * * * "

There follows in numbered paragraphs one through eleven an itemization of such operations and the license fee for each.

CONCLUSION

It is the opinion of this department that the authority given

Honorable Raymond B. Hopfinger

to St. Louis County, a county of the first class, to require licenses upon the businesses itemized in Section 316.040, RSMo Cum. Supp. 1957, includes those businesses which are located within incorporated areas in the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

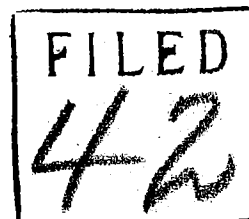
HPW:mlw:em

CITY MANAGER FORM OF GOVERNMENT:
TRANSPORTATION OF VOTERS:

Numbered paragraph 1 of Section
78.550, RSMo 1949, does apply at a
special election in a city of the
third class under the city manager

form of government which election is held to determine whether the
city shall abandon or retain the city manager form of government.

September 29, 1959



Honorable John A. Honsinger
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Honsinger:

I have your letter of September 14, 1959, which reads as
follows:

"This office respectfully requests an opinion
of your office regarding an interpretation of
Section 78.550, R. S. Mo., 1949, in the following
respects:

"Does sub-section 1 of the aforementioned statute
providing that no person or persons employ a car-
riage or an automobile for the purpose of hauling
voters on primary or election days apply to a
special election being held in the City of Lebanon,
Missouri, for the purpose of determining whether
or not said City is to retain the City Manager
form of government.

"For your additional information, this special
election is being held on Tuesday, October 6,
1959, after a petition in proper form was filed
under the statutory sections pertaining to City
Manager form of government. I would appreciate
an early opinion, if at all possible, since the
election will be held very shortly."

Numbered paragraph 1 of Section 78.550, RSMo 1949, reads:

"1. No person or persons shall use or employ
any carriage or automobile or vehicle of any
kind for the purpose of hauling voters to the
polls on primary or election days."

Honorable John A. Honssinger

The above is part of the election law applicable to elections held in cities of the third class under the city manager form of government, which is the status of the City of Lebanon at this time.

Section 78.450, MoRS Cum. Supp. 1957, sets forth the procedure which such a city of the third class under the city manager form of government is to follow in voting upon the issue of whether it will abandon or retain the city manager form of government. It is undoubtedly under this section that you are holding the election which we are considering. This section holds that such an election shall be a "special election." Since the words "election days", as used in Section 78.550, supra, are used without qualification, we believe that they would include a "special" election. In the case of *In re Buwley* 245 N.Y.S. 105 1.c. 108, the New York Supreme Court held that the term "election" used without qualifications includes primary, special and general elections.

CONCLUSION

It is the opinion of this department that numbered paragraph 1 of Section 78.550, RSMo 1949, does apply at a special election in a city of the third class under the city manager form of government which election is held to determine whether to abandon or retain the city manager form of government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

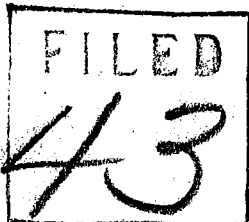
JOHN M. DALTON
Attorney General

HPW/mlw

TAXATION:
EXEMPTION FROM TAXATION:
CHARITIES:

The charter and bylaws of the Community Memorial Hospital would not appear to prevent its being a charitable institution and entitled to tax exemption if, as a matter of fact, the operation of such hospital is such as to entitle it to be considered a charitable institution.

P. H.
a. c.



February 12, 1959

Honorable C. M. Hulen, Jr.
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Hulen:

Reference is made to your request for an official opinion, which request reads as follows:

"The Assessor of Randolph County has asked me to request an opinion from your office concerning whether or not the Community Memorial Hospital of Moberly, Missouri, is exempt from taxation.

"Enclosed, herewith, find photostatic copies of: Articles of Incorporation under the General Not for Profit Corporation Act, Certificate of Incorporation of Community Memorial Hospital, and By-Laws of Community Memorial Hospital."

Article X, Section 6 of the Missouri Constitution, enumerates what property shall be exempt from taxation as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Honorable C. M. Hulien, Jr.

Section 137.100, subsection 6, V.A.M.S., provides for tax exempt property as follows:

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

It appears from the documents submitted with your request that the Community Memorial Hospital (osteopathic) was incorporated in 1957 under the General Not For Profit Corporation Law, Chapter 355, V.A.M.S. A "not for profit corporation" is defined in Section 355.015, thusly:

"(3) 'Not for profit corporation' means a corporation no part of the income or property of which is distributable to its members, directors or officers; provided, however, that the payment of reasonable compensation for services rendered and the making of distributions not representing pecuniary profits or gains upon dissolution or final liquidation, as permitted by this chapter, shall not be deemed a distribution of income or property."

The purposes for which the corporation was organized, as stated in the articles of incorporation, are as follows:

"5. The purpose or purposes for which the corporation is organized are: To establish and maintain a hospital for the care of persons suffering from illnesses or disabilities which require that the patients receive hospital care; to carry on any educational activities related to rendering care to the sick and injured or the promotion of health, which in the opinion of the Board of Trustees may be justified by the facilities, personnel, funds or other requirements that are or can be made available, to promote and

Honorable C. M. Hulen, Jr.

carry on scientific research relating to the care of the sick and injured insofar as, in the opinion of the Board of Trustees, such research can be carried on in, or in connection with the hospital; to participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of the community; to receive gifts, bequests, devises and other conveyances of personal and real property and to accept same with or without limitations or as endowments or as memorials or in trust for the benefit of or for any purpose or purposes for which the corporation is organized; to maintain an out-patient clinic and to foster, encourage and promote study, investigation and research in the art of diagnosis, healing and relieving human suffering and to foster and spread knowledge of medicine and treatment in relieving human suffering and disease; to procure the attendance of competent physicians and surgeons, (both D.O. and M.D.), nurses and attendants including laboratory technicians, scientists and other persons necessary, usual or beneficial in carrying out the purposes of the corporation and to maintain free beds for such disabled and indigent persons and to furnish proper attendance for their care as may be admitted to the hospital, subject to such special rules and regulations as the Board of Trustees may establish from time to time for their admission, care and treatment. The hospital shall be conducted independent of sectarianism, and shall be open to any sect or creed. No charge for board, room, general nursing, medicines, medical care and attention shall be made of those patients who are unable to pay."

The general rule as to whether a hospital is a charitable institution is stated in 10 Am.Jur., Charities, Section 135, p. 685, thus:

"A corporation, the object of which is to provide a general hospital for sick persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of sustaining the hospital,

Honorable C. M. Hulen, Jr.

and conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution. Moreover, the facts that a corporation, established for the maintenance of a public hospital, by its rules requires of its patients payment for their board according to their circumstances and the accommodation they receive, that no person has individually a right to demand admission, and that the trustees of the hospital determine who are to be received do not render it the less a public charity. * * *

In 14 C.J.S., Charities, Section 2, subsection (3), p. 422, it is stated that the test in determining whether a hospital is a corporation organized for the purpose of founding and maintaining a hospital as charitable or otherwise is whether or not it is maintained for gain, profit or advantage. See also *Northeast Osteopathic Hospital v. Keitel*, 197 S.W.2d 970, 975, wherein the above noted test is recognized.

The appellate courts of this state have held that the fact that a hospital derives part of its revenue from paying patients does not exclude it from the benefits of the constitutional exemption from taxation. (See *State ex rel. v. Powers*, 10 Mo.App. 263, affirmed 74 Mo. 476), if the hospital were equally available to those who could not pay and if the income were used in furtherance of the charitable purposes. *Northeast Osteopathic Hospital v. Keitel*, 197 S.W.2d 970, 975.

We wish to call attention to the fact that cases in other jurisdictions have held that a hospital loses its character as a charitable institution if it receives pay patients to such an extent as would exhaust its accommodations and prevent its receiving and extending hospital service to the usual and ordinary number of indigent patients applying for admission. 10 Am.Jur., Charities, Section 135, pp. 685 and 686. This rule would seem to be in accord with the views expressed in the *Northeast Osteopathic Hospital* case, l.c. 975, supra, to the effect that pay patients are admitted for treatment would not make the hospital less charitable if the hospital were "equally" available to those who could not pay.

It has also been held in this state that the exemption from taxation depends not alone upon the purposes for which the organization is organized but is also dependent upon the actual use of

Honorable C. M. Hulen, Jr.

the property. See Salvation Army v. Hoehn, 188 S.W.2d 826, 828. Whether or not the Community Memorial Hospital is in actual operation a charitable institution presents a factual question upon which we cannot express a legal opinion.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the charter and bylaws of the Community Memorial Hospital would not appear to prevent its being a charitable institution and entitled to tax exemption if, as a matter of fact, the operation of such hospital is such as to entitle it to be considered a charitable institution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:jar

HIGHWAY COMMISSION:
PUBLIC BUILDINGS:

A contract for contemplated construction, rehabilitation or repair of highway department district offices need not be awarded by the Chief of Planning and Construction but said contract, nevertheless, must be approved by said official.

May 7, 1959



Honorable Robert L. Hyder
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri

Dear Mr. Hyder:

Reference is made to your request for an official opinion, which request reads as follows:

"The State Highway Commission has requested that I ask your official opinion on the following question: The State Highway Commission is authorized under Section 30, Subsection 4, of Article IV of the Constitution of Missouri 'to acquire materials, equipment and buildings necessary for the purposes herein described;'. It has been necessary in the pursuance of the constitutional mandate to construct and maintain highways that the Commission acquire and maintain buildings in various areas of the State (and outside Jefferson City) which have been designated as district offices. It has been the practice of the Commission to let contracts for the necessary enlargement of these district offices from time to time, and enlargement of one or more district offices is planned in the immediate future. Since the enactment of Laws of Missouri, 1958, pages 183-186, the Chief of Planning and Construction has advised representatives of the Highway Department that it is now a part of his functions to let contracts for work of the above-described nature on our district offices for construction and maintenance of highways outside Cole County. The two questions, therefore, presented are as follows:

Honorable Robert L. Hyder

"(1) Is the Chief of Planning and Construction now authorized to let contracts involving buildings being acquired by the State Highway Commission and outside Cole County and the State Highway Commission no longer authorized to let such contracts? (2) Do you interpret the duties of the Chief of Planning and Construction under Section 7, founds in Laws of Missouri for 1958 at page 185, to be to serve as adviser and consultant to department heads in letting contracts or that he shall actually in his official capacity let all contracts?"

Section 8.310, V.A.M.S., provides in part as follows:

"The chief of planning and construction shall serve as advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation or construction of buildings without approval of the chief of planning and construction, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the chief of planning and construction; * * *"

Before undertaking a discussion of this precise question, we deem it advisable to ascertain what was intended by the use of the terms "letting" and "let," in the above section. The use of these terms, under a similar statute, was construed by the Supreme Court of Georgia in the case of Eppes v. Mississippi, Gainesville & Tuscaloosa Railroad Co., 35 Ga. 33, 1.c. 35, wherein the court in its opinion stated:

"By turning to Webster's dictionary, I find that 'letting' is an americanism, used to signify the act of putting out portions of work to be performed by contract, as on a railroad or canal, and it has in our country that acceptation. The letting or putting out of the contract is a different thing from the invitation to make proposals for it. The letting is posterior to the invitation for proposals. It is made after the

Honorable Robert L. Hyder

proposals have been received in pursuance to the invitation, and after they have been considered; and is the act of awarding the contract to the proposer. * * *

We are of the opinion that the above constitutes a correct definition and that to "let" or "letting" as used in the above statute simply means the act of awarding the contract to the successful bidder.

Section 8.310, V.A.M.S., imposes upon the Chief of Planning and Construction the duty to serve as "advisor and consultant" to all department heads in obtaining architectural plans, letting of contracts and supervising construction. Said section further provides that no contract shall be let for repair, rehabilitation or construction of buildings without the approval of the Chief of Planning and Construction. Neither this section nor any other statutory provision that we have been able to find specifically imposes upon the Chief of Planning and Construction the actual duty of making an award of a contract for the construction, repair or rehabilitation of buildings such as you have described. Consequently, we are of the opinion that a contract for the contemplated construction, repair or rehabilitation of highway department district offices need not be awarded by the Chief of Planning and Construction, although such award of contract must, nevertheless, be approved by said office.

This office reached a similar conclusion in an opinion issued to you under date of May 26, 1953, construing the provisions of Section 8.070, RSMo 1949, relating to the duties of the then Director of Public Buildings, which section was almost identical, insofar as we are here concerned, with the provisions of Section 8.310, V.A.M.S. A copy of said opinion is attached hereto.

CONCLUSION

Therefore, it is the opinion of this office that a contract for the contemplated construction, rehabilitation or repair of highway department district offices need not be awarded by the Chief of Planning and Construction but said contract, nevertheless, must be approved by said official.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw
Enclosure

COUNTIES:
PLANNING AND ZONING:
COUNTY COOPERATION:

Clay County is authorized to provide for the preparation, adoption, amendment, extension and carrying out of a county plan for the areas of Clay County which include the City of Liberty, Missouri, after approval by a vote of the people of the county in accordance with Section 64.510, RSMo Cum. Supp. 1957.

May 11, 1959



Honorable Randall S. Jessee
Executive Director
Metropolitan Area Planning Council
701 Railway Exchange Building
Kansas City 6, Missouri

Dear Sir:

This is in response to your letter of January 19, 1959, in which you request an opinion from this office. In view of your letter and your subsequent conversation with a member of our staff on May 8, 1959, it is our understanding that the question which you present is as follows:

In view of our opinions of May 29, 1958 to the Honorable Floyd R. Gibson, Independence, Missouri, and to the Honorable Randall S. Jessee on November 12, 1958, Kansas City, Missouri, is Clay County authorized to provide for the preparation, adoption, amendment, extension and carrying out of a county plan for the areas of Clay County which include the City of Liberty?

We enclose copies of the opinions mentioned above, and we herein set forth Section 64.510, RSMo Cum. Supp. 1957:

"The county court of any county of the second or third class may, after approval by vote of the people of the county, provide for the preparation, adoption, amendment, extension and carrying out of a county plan for all areas of the county outside the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of the

Honorable Randall S. Jessee

state which are not more than forty miles from the corporate limits of any city which now has or may hereafter have more than thirty-five thousand inhabitants, or all areas of any county which is adjacent to a county containing a city of more than four hundred and fifty thousand inhabitants. Upon the adoption of the county plan there is created in the county a county planning commission as hereinafter provided."

You will observe from our opinion of November 12, 1958, that Sections 64.010 to 64.160, RSMo 1949, provide for the creation and functioning of a county planning commission in counties of the first class. You will also note that it is our view that such first class counties have no authority to enter into a contract to formulate a plan which would include the area of Kansas City. This is founded upon the fact that the planning jurisdiction of the area of Kansas City is authorized by Section 400 of the charter of that city creating a Kansas City Planning Commission. For this reason we have held that Kansas City would have to become a participant in such a planning arrangement as an entity itself.

We know of no authorization in the laws creating the City of Liberty to the effect that Liberty may create any such planning commission.

It is our belief that Section 64.510, RSMo Cum. Supp. 1957, explicitly provides for the county court of any county of the second or third class, after approval by a vote of the people of the county, to provide for the preparation of a county plan for all areas of any county which is adjacent to a county containing a city of more than 450,000 inhabitants. We believe that the authorization of this section would apply to the county court of Clay County and that the plan may be created to include the area of the City of Liberty.

CONCLUSION

It is the opinion of this office that Clay County is authorized to provide for the preparation, adoption, amendment,

Honorable Randall S. Jessee

extension and carrying out of a county plan for the areas of Clay County which include the City of Liberty, Missouri, after approval by a vote of the people of the county in accordance with Section 64.510, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

WAREHOUSEMAN: Warehouseman licensed under Chapter 415, RSMo 1949,
LOCKER PLANTS: are excluded from Sections 196.450 to 196.515,
RSMo 1949, by Section 196.510, supra.

March 5, 1959



Mr. Harvey L. Johnston
Director - Dairy Division
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Johnston:

This office is in receipt of your recent letter in which you ask us to render an opinion on the following matter:

"We have a company in the ice and cold storage business who also rents lockers to the public. The plant qualifies under the definitions in section 196.450 (6) Locker (7) Locker Plant (8) Locker Room.

The management contends that the part of section 196.510 that reads (nor shall the provisions of sections 196.450 to 196.515 apply to any warehouseman licensed under the provisions of chapter 415, RSMo 1949.) frees them from licensing and regulation by the Commissioner of Agriculture in their locker rental business.

We respectfully request an opinion on the question.

Does holding a warehouse license exempt the locker rental part of a plant from regulation under sections 196.450 to 196.515?"

Sections 196.450 to 196.515, RSMo 1949, were enacted to regulate the operation of plants for the cold storage of food in individual lockers. (See Laws of Missouri 1945, page 940.) It is obvious from reading the aforesaid Act that the Legislature's

Mr. Harvey L. Johnston

primary intention in enacting this law was to protect the health of the general public. Provisions are made for inspecting the plants for sanitary conditions and definite requirements are set out as to how the food must be handled, etc.

Section 196.450, supra, defines the terms "locker" and "locker plants" as follows:

"(6) 'Locker' means the individual sections or compartments of a capacity of not to exceed fifty cubic feet, in the locker room of a locker plant;

(7) 'Locker plant' means a location or establishment in which space in individual lockers is rented for the storage of food;"

It is apparent from what you say in your letter that a certain company, licensed as a warehouseman under Chapter 415, RSMo 1949, is renting "lockers" and operating a "locker plant" as these terms are defined by Section 196.450, supra. It would seem, therefore, that said company or warehouseman would have to comply with the requirements of the above mentioned Act since they are apparently embraced within its terms.

However, we call your attention to Section 196.510, supra, which reads, in part, as follows:

" * * * Operators of locker plants shall not be construed to be warehousemen, nor shall receipts or other instruments issued by such persons in the operation contracts of their business be construed to be warehouse receipts or subject to the laws applicable thereto, nor shall the provisions of sections 196.450 to 196.515 apply to any warehouseman licensed under the provisions of chapter 415, RSMo 1949."

The above quoted part of Section 196.510, supra, states in clear language that the provisions of Sections 196.450 to 196.515, do not apply to warehousemen licensed under Chapter 415, supra.

Mr. Harvey L. Johnston

Its provisions are mandatory and unqualified. We do not believe this provision is subject to construction or that its terms can be ignored. Nor do we think we are in a position to say whether the Legislature intentionally or inadvertently excluded warehousemen from the provisions of the aforesaid Act.

CONCLUSION

We, therefore, conclude that Section 196.510, supra, excludes licensed warehousemen from the provisions of Sections 196.450 to 196.515, supra, and renders said Act inapplicable to them.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

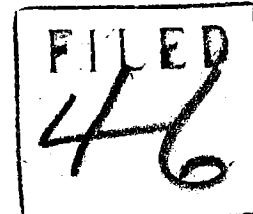
Yours very truly,

John M. Dalton
Attorney General

JBA:om

SUPREME COURT RULE 26.01: In those cases in magistrate court wherein the defendant pleads not guilty and waives his right to trial by jury, the magistrate should obtain a written waiver in accordance with Supreme Court Rule 26.01.

April 20, 1959



Honorable William G. Johnson
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

On January 16, 1959 you wrote to this department as follows:

"The question has been raised in a case now pending in our Court that under Rule 26.01 of the Supreme Court, it is necessary for a Magistrate to obtain a written waiver of jury in any case in which a plea of not guilty is entered and that without such waiver the Court has no power to proceed with the trial."

On February 4, 1959 we advised you "that it is our invariable practice not to render opinions on matters which are in litigation as you state this matter to be."

Subsequently, we received from you a letter dated February 24, 1959, which reads as follows:

"In my letter to you dated January 13, 1959 I indicated that a question had been raised concerning the interpretation of Supreme Court Rule 2601 which was pending in our Court. The question is not pending in any Court in our county and my statement that it was is erroneous. The question is whether a Magistrate should obtain a written waiver of a right to a trial by jury when the defendant pleads not guilty and is willing to have the Court hear the evidence instead of a jury."

"It seems to me that if the rule is given its literal meaning, then every case before a Magistrate on a plea of not guilty where the

Honorable William G. Johnson

Court finds the defendant guilty is subject to a proceeding to set aside the verdict if a written waiver was not entered into by the defendant and the Prosecuting Attorney with the advice and consent of the Magistrate.

"May I hear from you at your earliest convenience as to your interpretation of this rule because our area will soon be visited by many tourists and the case load in the Magistrate Court will be tremendous and if it is necessary to have a written waiver we want to make it part of our procedure and routine."

Since you now state that the matter of your inquiry is not presently in litigation, we will be glad to render our opinion regarding it. This opinion is predicated upon the assumption that the cases in question are misdemeanor cases. Sections (a) and (b) of Supreme Court Rule 26.01, which is the subject of your inquiry, read:

"(a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

"(b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury. Such waiver and assent shall be in writing, signed by the defendant and the judge, and filed of record."

It will be noted that (a) above states that "All issues of fact in any criminal case * * *." Certainly the cases to which you have reference, tried before a magistrate, are criminal cases. It would, therefore, appear that criminal cases tried in magistrate courts come within the purview of Rule 26.01.

We are further inclined to this opinion by Supreme Court Rule 36.01, which reads:

"These Rules govern the procedure in all criminal proceedings in all courts of the State of Missouri having jurisdiction of criminal proceedings."

Honorable William G. Johnson

It would appear to us that the above is decisive of this matter and that, therefore, a written waiver is required under the circumstances set forth by you.

CONCLUSION

It is the opinion of this department that in those cases in magistrate court wherein the defendant pleads not guilty and waives his right to trial by jury that the magistrate should obtain a written waiver in accordance with Supreme Court Rule 26.01.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:hw

CITIES: The legislative body of any city of the third class,
STREET REPAIRS: fourth class, of any city having a special charter,
SPECIAL TAX: and towns and villages shall have power within the
municipality by ordinance, to cause the streets,
avenues, alleys and public places of the city or
any part thereof to be sprinkled, oiled, or repaired,
surfaced and resurfaced, and the cost thereof to be provided for and
defrayed by a special tax assessed on the adjoining property fronting
or bordering on those surfaces repaired, etc., as frequently as that
legislative body deems it necessary so long as the total cost of such
improvements shall not exceed \$1.00 per front foot per annum upon
said assessed property.

September 16, 1959



Honorable Basil V. Jones, Member
Missouri House of Representatives
Cass County
308 North Jeffreys
Pleasant Hill, Missouri

Dear Mr. Jones:

This is in response to your letter of August 22, 1959,
which we quote:

"Inquiry has been made of me as to how often a city may exercise the provisions of House Bill No. 280, which directs the action of city governments in repairing city streets, at a maximum cost of \$1.00 or less per front foot. My city fellows want to know if this particular application may be made more often than once per year. Since, obviously, there would quite necessarily be a definite limitation as to frequency allowed, will you be so kind, General, as to give me this information with regard to this bill, made into law as of the 29th day of this August. I would suppose once per year would be the correct answer. I know you won't have to 'think' about the matter but will know. Even I am not too sure that I should address your office. If not, I am sure you will refer my question to the proper state office, please."

We quote Section 88.665, House Bill No. 280, 70th General Assembly, Truly Agreed to and Finally Passed:

"The legislative body of any city of the third class, fourth class, of any city

Honorable Basil V. Jones

having a special charter, and towns and villages shall have power within the municipality, by ordinance, in all cases where the cost does not exceed \$1.00 per front foot per annum upon the property abutting upon any street, avenue, alley or public place to be improved as in this section provided, to cause the streets, avenues, alleys and public places of the city, or any part thereof, to be sprinkled, oiled, repaired, surfaced and resurfaced, and the cost thereof to be provided for and defrayed by a special tax to be assessed in favor of the municipality or contractor on the adjoining property fronting or bordering on the streets, avenues, alleys and public places where such sprinkling, oiling, repairing, surfacing and resurfacing is proposed to be done, in proportion that the linear feet of each lot fronting or bordering on the street, avenue, alley and public place so to be sprinkled, oiled, repaired, surfaced and resurfaced bears to the total number of linear feet of all the property chargeable with the special tax aforesaid in the territory embraced by the contract under which said sprinkling, oiling, repairing, surfacing and resurfacing is to be done. The above work may be done by said municipality and an accurate account of the cost thereof kept by said municipality or may be contracted for annually by the legislative body at such time and under such terms as shall be provided by ordinance, and the municipality shall be divided into convenient sprinkling, oiling, repairing, surfacing and resurfacing districts for the above purpose, and each district shall be let separately. The special tax bill spoken of shall be and become a lien on the property charged therewith from and after the commencing of such sprinkling, oiling, repairing, surfacing and resurfacing of such streets, avenues, alleys or public places under the provisions of an ordinance providing therefor, and shall be prima facie evidence of the liability of the property charged therewith to the extent and amount therein specified and may be collected of and from the owner of the land in the name of and by such municipality

Honorable Basil V. Jones

or contractor as any other claim in any court of competent jurisdiction with interest at a rate not to exceed eight per cent per annum, and they shall be issued and collected in the manner provided by ordinance; provided, that in no case shall the provisions of this section apply where the cost of such improvement shall exceed \$1.00 per front foot per annum upon the property abutting upon any street, avenue, alley or public place, provided further, that the cost of sprinkling, oiling, repairing, surfacing and resurfacing of any street, avenue, alley or public place or any part thereof may be paid out of the general revenue fund of the municipality or other funds which the municipality may have for such purposes if the legislative body of such municipality so desires, in which case the proceedings of the municipality for such improvements shall specify that payment will be made out of the general revenue fund or other funds in whole or in part."

It is the opinion of this office that Section 88.665, supra, authorizes the legislative body of any city, as therein specified, by ordinance to cause the streets, avenues, alleys and public places of the city or any part thereof to be sprinkled, oiled, repaired, surfaced and resurfaced, with the cost thereof to be provided for and defrayed by a special tax assessment with the frequency that the legislative body of that city desires, so long as the frequency of such actions does not cause the expenses therefor to be in excess of \$1.00 per front foot per annum.

This is a matter of statutory construction, and there would appear to be no restriction in House Bill No. 280, supra, which would preclude the legislative body of the city involved from effecting the stated repairs of the streets as often as it so chooses in a year's time consistent with the maximum expenses authorized by House Bill No. 280, supra.

CONCLUSION

It is the opinion of this office that the legislative body of any city of the third class, fourth class, of any city having a special charter, and towns and villages shall have power within the municipality by ordinance, to cause the streets, avenues, alleys and public places of the city or any part

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thereof to be sprinkled, oiled, or repaired, surfaced and re-surfaced, and the cost thereof to be provided for and defrayed by a special tax assessed on the adjoining property fronting or bordering on those surfaces repaired, etc., as frequently as that legislative body deems it necessary so long as the total cost of such improvements shall not exceed \$1.00 per front foot per annum upon said assessed property.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

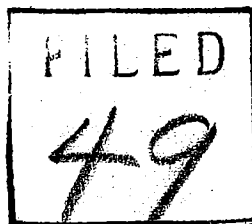
Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

COUNTY COURT:
COUNTY ASSESSOR:
ASSESSOR:
OFFICERS:
COUNTY OFFICERS:
CLERICAL ASSISTANTS:

In third and fourth class counties, allowance to county assessor for clerical and stenographic assistants is determined by county court in amount not to exceed \$600 in fourth class counties and \$1,200 in third class counties.



December 31, 1959

Honorable John C. Kibbe
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This is in answer to your recent letter requesting an official opinion of this office, and reading as follows:

"Our county court has asked me to request an opinion concerning Section 53.095, Missouri Revised Statutes, providing for appointment and compensation of assistants to the county assessors in third and fourth class counties.

"The first sentence of this statute states that the assessor may fix the compensation of such assistants. The second sentence says that same shall be paid from the county treasury subject to the approval of the county court.

"If the county court and assessor fail to agree upon the compensation of such an assistant, who has the ultimate authority to determine the amount?"

Section 53.095, House Bill No. 87 of the 70th General Assembly, provides as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of the clerical or stenographic assistants shall be paid from

Honorable John C. Kibbe

the county treasury subject to the approval of the county court, and shall not exceed twelve hundred dollars per annum in counties of class three and six hundred dollars per annum in counties of class four."

Under the provisions of the first sentence of Section 53.095, the county assessors in counties of class three and four are given authority to appoint and fix the compensation of clerical or stenographic assistants necessary for the efficient performance of the duties of such office. However, the succeeding sentence, relating to the compensation to be allowed for such clerical and stenographic assistants, provides that the compensation of such clerical or stenographic assistants is to be paid from the county treasury "subject to the approval of the county court," and further provides a maximum amount that may be allowed. We believe it to be clear that the provision stating the compensation is to be paid "subject to the approval of the county court" is a legislative delegation of the power to the county court to determine in a nonarbitrary manner the amount that is necessary to be allowed to the county assessor for clerical and stenographic assistants.

In the case of State ex rel. v. Daues, 287 SW 430, 315 Mo. 701, the Supreme Court had under consideration a statute providing that the county court should allow the county treasurer such compensation as "may be deemed just and reasonable." At SW 1.c. 431 the court said:

"It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power, as respects the office of county treasurer, the Legislature has delegated to the county court, the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer - which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. * * *"

Honorable John C. Kibbe

In the case of Miller v. Webster County, 228 SW2d 706, the Supreme Court quoted from the case of Bradford v. Phelps County, 210 SW 996, and said, l.c. 708-709:

" * * * But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and summary way - since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make.'
* * *"

The court further said, l.c. 709:

" * * * The evidence does not demonstrate that the County Court, in refusing to make an allowance for stenographic hire for the Prosecuting Attorney of Webster County acted so arbitrarily and capriciously or so abused its discretion that either this court or the circuit court may substitute their judgment for that of the County Court in the circumstances. * * *"

Under the holding by the Supreme Court in these cases, it is our view that under the provisions of Section 53.095, supra, the determination of the amount to be allowed county assessors in counties of the third and fourth class for clerical and stenographic assistants is in the discretion of the county court

Honorable John C. Kibbe

and such determination cannot be overthrown, as long as the county court does not act arbitrarily and capriciously but does act in an honest, nonarbitrary manner.

CONCLUSION

It is the opinion of this office that the determination of the amount to be allowed to county assessors in counties of the third and fourth class for clerical and stenographic assistants is left to the honest, nonarbitrary discretion of the county courts of such counties, provided that the allowance cannot exceed the sum of \$600 in fourth class counties and \$1,200 in third class counties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

CEB:ml

CITIES, TOWNS
AND VILLAGES:
INSURANCE:

Cities of Third Class in Missouri, operating with city manager form of government and having authority under Section 78.570, RSMo 1949, to fix compensation of its employees, may by ordinance provide that as part of said compensation it will defray the premium cost of group life and hospitalization coverage on its employees.

April 8, 1959

Filed: #52

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Leggett:

This opinion is in answer to your recent inquiry reading as follows:

"A question has been raised with us by certain interested parties as to the right of the City of Mexico, Missouri, which is a third class city under our laws, operating on the City Manager Plan, to use the city's funds to pay the premiums on a group insurance contract covering the employees of that city. The group insurance would provide life, accidental death and dismemberment, accident and sickness, hospital expense, surgical expense, and hospital-medical expense coverage. The program would cover appointive positions only and would not include elective officials. We are enclosing a copy of Ordinance No. 2048, paragraph 3 of which contains the ordinance authorizing this insurance program.

"May I have your opinion as to whether or not such third class city may validly adopt such an ordinance and provide such an insurance program."

The city of Mexico, Missouri, is a city of the Third Class with city manager form of government authorized by Sections 78.430 to 78.640, RSMo 1949, as amended. Ordinance No. 2048 of the city of Mexico provides:

Honorable C. Lawrence Leggett

"Bill No. 58-111

Ordinance No. 2048

AN ORDINANCE TO AMEND ORDINANCE NO. 1992 OF THE ORDINANCES OF THE CITY OF MEXICO, MISSOURI BY ADDING THE POSITION OF 'SUPERINTENDENT OF BUILDINGS AND GROUNDS MAINTENANCE' UNDER ADMINISTRATIVE AND MANAGEMENT OF SECTION 1 AND ASSIGNING THE GRADE THERE-TO; AMENDING SECTION 7 TO PROVIDE FOR A RATE OF COMPENSATION FOR DIRECTOR OF RECREATION; ADDING A NEW SECTION DESIGNATED 9(a) PROVIDING FOR ADDITIONAL COMPENSATION FOR ALL EMPLOYEES IN THE FORM OF GROUP HOSPITALIZATION AND LIFE INSURANCE PLAN PREMIUMS TO BE PAID BY THE CITY OF MEXICO

"BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEXICO, MISSOURI AS FOLLOWS:

"1. Section 1 of Ordinance No. 1992 of the Ordinances of the City of Mexico, Missouri is hereby amended by adding to that portion of Section 1 under Administrative and management the position of 'Superintendent of Buildings and Grounds Maintenance', Class Grade 25.

"2. Section 7 of Ordinance No. 1992 of the Ordinances of the City of Mexico, Missouri is hereby amended by deleting the figures '\$1600' under 'annual' and the words and figures 'May - August \$150 September - April \$25' under 'semi-monthly' in the line for 'Director of Recreation' and enacting in lieu thereof the figures '\$2100' under 'annual' and the words and figures 'June through August \$200, September through May \$50' under 'semi-monthly' in said line for 'Director of Recreation'. The rate of compensation for such position of 'Director of Recreation' shall henceforth be as shown by the amended words and figures herein set forth.

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"3. There is hereby enacted a new Section designated 9(a) to be a part of Ordinance No. 1992 of the Ordinances of the City of Mexico, Missouri to become a part of said Ordinance following Section 9 thereof to read as follows:

'Section 9(a) - In addition to the rates of compensation provided for each employee as hereinabove set forth the City of Mexico shall maintain and pay the premiums on a group hospitalization and life insurance plan in which each employee of the City shall be enrolled as a member. On the first day of February annually contract with a recognized insurance company licensed to underwrite such plans for the State of Missouri shall be entered into in behalf of the City by the City Manager to provide coverage for City employees on the following minimum basis:

(a) A hospitalization program including surgical benefits which will pay a minimum of \$8.00 per day for hospital room, plus other medical expenses;

(b) One Thousand Dollars (\$1,000) per employee life insurance on a term basis.

'The insurance carrier shall be designated by the Council by motion following the receipt of proposals by such insurance companies as offer to underwrite the plan. Proposals shall be received annually between January 15th and January 20th and the Council shall select the insurance carrier in a meeting between January 20th and January

Honorable C. Lawrence Leggett

21st for the following year beginning February 1st. The premium cost of such plan shall be carried in budget account "Unclassified Account No. 9" under "Miscellaneous Services 7 Insurance Hospital and Life". The amount so paid on each employee shall not be considered as taxable income to such employee and shall not be deemed part of his compensation for tax reporting purposes, although for the purposes of this Ordinance such premiums shall be considered partial compensation for such employee's services to the City of Mexico.'

"4. This ordinance shall be in effect from and after its passage.

"Passed this 26 day of January, 1959.

Clarence S. Torreyson
MAYOR

"ATTEST:

Fae Lowry
CITY CLERK"

Under paragraph 3 of Ordinance No. 2048, supra, we find that Section 9(a) becomes a part of Ordinance No. 1992 of the ordinances of the City of Mexico, and specifically provides that the amounts to be paid by the city to cover premiums on "a group hospitalization and life insurance plan in which each employee of the City shall be enrolled as a member," are to "be considered partial compensation for such employee's services to the City of Mexico."

Section 78.440, RSMo 1949, discloses the applicability of general statutes to cities of the Third Class which have adopted the city manager form of government and provides, in part, as follows:

"All laws governing any city under its former organization and not inconsistent with the provisions of sections 78.430 to 78.640, shall apply to and govern such city after it

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adopts the form of government herein provided, or all bylaws, ordinances and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed by the council elected under the provisions of said sections. * * * The operation of any of said sections governing cities of the third class, which may be inconsistent with the provisions of said sections shall be suspended in those cities adopting the said sections."

Section 78.570, RSMo 1949, sets forth the powers of the city council of a city operating with a city manager form of government as provided for in Sections 78.430 to 78.640, RSMo 1949, in the following language:

"78.570. Powers of council -- city manager.--
1. Except as herein otherwise provided the council of any city organizing under sections 78.430 to 78.640, shall have all of the powers now or hereafter given to the council or to the mayor and council jointly, under the law by which such city adopting said sections was governed under its former organization; and shall have such power over and control of the administration of the city government as is provided in said sections.

"2. It shall be the duty of the council to pass all ordinances and other measures conducive to the welfare of the city and to the proper carrying out of the provisions of sections 78.430 to 78.640. It shall appoint a suitable person not a member of the council to be the administrative head of the city government whose official title shall be 'city manager.' The council shall also provide for all offices and positions in addition to those herein specified, which may become necessary for the proper carrying on of the work of the city, and shall fix the salary and compensation of all officers and employees of the city not herein provided for. All officers of the city shall be paid

Honorable C. Lawrence Leggett

in equal monthly installments for their services and all employees of the city shall be paid monthly or at such shorter periods as the council shall determine. The creation of all offices and salaries attached thereto, which may be provided for by the council under sections 78.430 to 78.640, shall be by ordinance, and they shall all be for an indefinite term. The council shall also provide office rooms at the city hall or at some other convenient and suitable place in the city for the transaction of the business of the city and for the convenience of its officers."

In the second paragraph of the foregoing statute, Section 78.570, supra, we find a mandatory power vested in the city council to fix the salary and compensation of all officers and employees not provided for in this special law. The creation of offices and the fixing of salaries attached thereto is required by the statute to be done by ordinance. The statute contemplates officers as well as employees, and the remuneration of officers is referred to as "salary" and remuneration of employees is referred to as compensation. However, the statute contains no prohibition against fixing the compensation of employees by ordinance, and that is normal procedure.

Section 78.570, RSMo 1949, quoted supra, gives authority to a city such as Mexico, Missouri, to fix the compensation of its employees, and we find no directive therein that such compensation must be only in stated money consideration. Under such circumstance, we rely on the rule announced in the case of *Petition of City of Liberty, (Mo.)*, 296 S.W. (2d) 117, 1.c. 123, as follows:

"The rule is that * * * 'where there is an express grant to a city without the method or details of exercising such power prescribed, the City Council has authority to exercise the power granted it in any reasonable and proper manner.' *Dodds v. Kansas City*, 347 Mo. 1193, 1200, 152 S.W.(2d) 128, 131. See, also, *State ex rel. City of Fulton v. Smith*, 355 Mo. 27, 194 S.W.(2d) 302."

Honorable C. Lawrence Leggett

An examination has been made of statutes having general application to Third Class cities, Chapter 77, RSMo 1949, and no prohibition has been found which would prohibit a city of the Third Class from providing, as part of the compensation to its employees, the cost of group hospitalization and group life insurance on its employees.

In the case of Hickey v. Board of Education of St. Louis, 363 Mo. 1093, 256 S.W.(2d) 775, the contention was made that to allow the Board of Education of St. Louis to defray the premium cost of Workmen's Compensation coverage for its employees would violate Sections 23 and 25, Art. VI, Missouri's Constitution of 1945, prohibiting a city or other political subdivision of Missouri from granting public money or thing of value to or in aid of an individual. The Supreme Court of Missouri spoke as follows in the Hickey case, supra, in the following language at 363 Mo. 1.c. 1044:

"The weight of authority is that expenditures of public moneys for workmen's compensation for public employees are for public purposes and are not 'grants' of public money."

In the case of State ex rel. Thompson v. Memphis, 251 S.W. 46, 147 Tenn. 658, 27 A.L.R. 1257, 1.c. 1263, the Supreme Court of Tennessee upheld the right of the City of Memphis to take out group insurance on employees in the city's water department, and spoke, in part, as follows:

"It could hardly be contended but that the governing powers would have the right to increase the annual wages of each employee of the water department \$18 per annum, if justified by existing conditions. This, in effect, is what it did when it took out said policy of group insurance, but from an economic basis it concluded that better results would be obtained as to both parties by investing it in insurance instead of paying the money to the employee. Ordinarily, what can be done indirectly can be done directly. If a city can increase the wages of its employees, why not invest the increase in insurance for them, instead of paying it to them direct, if, by so doing, they are better satisfied and the city obtains better service?"

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that a city of the Third Class in Missouri, operating with city manager form of government, and having authority under Section 78.570, RSMo 1949, to fix the compensation of its employees, may by ordinance provide that as a part of said compensation it will defray the premium cost of group life and hospitalization coverage on its employees.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Miscellaneous mutual casualty company organized under Sections 379.205 to 379.310, RSMo 1949, as amended, may invest in and own all the capital stock of a regular life insurance company organized under Sections 376.010 to 376.670, RSMo 1949, as amended, but is subject to like limitations set forth in Section 379.080, RSMo 1949, applicable to stock companies.

April 14, 1959



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is in reply to your recent inquiry which posed the following question:

May a miscellaneous mutual casualty insurance company organized under Sections 379.205 to 379.310, RSMo 1949, as amended, invest in and own all the capital stock of a regular life insurance company organized under Sections 376.010 to 376.670, RSMo 1949, as amended, and chartered to write life, health and accident insurance?

For a miscellaneous mutual casualty company to own all the capital stock of a regular life insurance company would involve its power to invest its assets, and such power is clearly worded in the following language found in Section 379.255, RSMo 1949:

"No such company shall invest any of its assets except in accordance with the laws of this state relating to the investment of the assets of domestic stock companies transacting the same kinds of insurance."

In view of the reference made in the statute just quoted to "domestic stock companies transacting the same kinds of insurance," it is appropriate to quote in full Section 379.230, RSMo 1949, which discloses the kinds of insurance a miscellaneous mutual casualty company may write, and such statute provides:

"Any company organized under the provisions of sections 379.205 to 379.310 is empowered and authorized to make contracts of insurance or to reinsure or accept reinsurance

Honorable C. Lawrence Leggett

on any portion thereof, to the extent specified in its articles for the kinds of insurance following:

(1) Liability insurance. Against loss, expense or liability by reason of bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured may be liable or have assumed liability, including workmen's compensation;

(2) Disability insurance. Against bodily injury or death by accident and disability by sickness;

(3) Automobile insurance. Against any or all loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle: provided, no policies shall be issued under this subsection against the hazard of fire alone;

(4) Steam boiler insurance. Against loss or liability to persons or property resulting from explosions or accidents to boilers, containers, pipes, engines, fly wheels, elevators and machinery in connection therewith and against loss of use and occupancy caused thereby and to make inspection and issue certificates of inspection thereon;

(5) Use and occupancy insurance. Against loss from interruption of trade or business or loss of rents which may be the result of any accident or casualty;

(6) Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

Domestic stock insurance companies authorized to write miscellaneous casualty risks such as are outlined in Section 379.230, supra, are organized under and subject to Sections 379.010 to 379.200, RSMo 1949, as amended. The investment statute applicable

Honorable C. Lawrence Leggett

to these domestic miscellaneous stock casualty companies is Section 379.080, RSMo 1949. After outlining how the minimum capital of such companies shall be invested, Section 379.080, RSMo 1949, provides:

" * * * and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, * * * or in stocks, bonds or evidences of indebtedness issued by corporations organized under the laws of this state, * * *; provided, that no insurance company may buy stock in any company to an amount which will give the company so buying the virtual control of any other corporation, except that any corporation organized under or for the purpose of doing any of the kinds of business mentioned in one of the subdivisions of section 379.010 may buy and hold any amount of stock in other corporations organized under or for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of said section 379.010, but it may not purchase a majority of the shares in any other insurance corporation unless it has a capital of two hundred thousand dollars in addition to the capital required by this section for each such company, the controlling interest in which is purchased, and no such company shall invest more than thirty-five per cent of the surplus to policy holders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any such corporation." (Emphasis supplied.)

The quoted language from Section 379.080, supra, is directed to companies "organized under" or organized "for the purpose" of doing any of the kinds of business mentioned in any one of the subdivisions of Section 379.010, RSMo 1949, and such statute is the basic authority outlining the types of miscellaneous casualty coverage which may be written by miscellaneous stock casualty insurance companies. Regular life insurance companies, as suggested in the question posed at the beginning of this opinion, are formed under Sections 376.010 to 376.670, RSMo 1949, as amended, and not under Section 379.010, RSMo 1949. We next must resolve the question

Honorable C. Lawrence Leggett

of whether a regular life company is organized "for the purpose of doing any of the kinds of business" mentioned in one of the subdivisions of Section 379.010. The task is simplified by searching out the powers of the regular life company in this regard and then looking for similar powers given to miscellaneous stock casualty companies under Section 379.010, RSMo 1949, and related statutes.

Section 376.010, RSMo 1949, outlines the purposes for which a regular life company may be formed in the following language:

"Any number of persons, not less than thirteen, may associate and form a company for the purpose of making insurance upon the lives of individuals, and every assurance pertaining thereto or connected therewith, and to grant, purchase and dispose of annuities and endowments of every kind and description whatsoever, and to provide an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident or sickness to the person of the insured; but such accident and health insurance shall be made a separate department of the business of the life insurance company undertaking it." (Emphasis supplied.)

In the underscored language quoted above from Section 376.010, we find regular life companies vested with authority to write accident and health insurance, including indemnity against death resulting from accident. Is such a power vested in miscellaneous stock casualty companies organized under Section 379.010, RSMo 1949? It is concluded that an affirmative answer to such question is found in the following language from Section 379.010, RSMo 1949:

"1. Any number of persons, not less than thirteen in number, a majority of whom shall be citizens of this state, may associate and form an incorporation, association or company for the following purposes, to wit:

* * * * *

(3) To make insurance upon the health of individuals, and against personal injury, disablement, or death, resulting from

Honorable C. Lawrence Leggett

traveling or general accident by land or water, * * *. (Emphasis supplied.)

By comparing the language quoted above from Sections 376.010 and 379.010, RSMo 1949, it is apparent that a regular life insurance company is organized "for the purpose of doing any of the kinds of business mentioned in one of the subdivisions of section 379.010" as such language is used in the investment statute, Section 379.080, RSMo 1949, pertaining to miscellaneous stock casualty companies.

The foregoing examination of applicable statutes sustains our view that a miscellaneous mutual casualty company organized under Sections 379.205 to 379.310, RSMo 1949, as amended, has the same power to invest in the capital stock of a regular life company as is accorded a miscellaneous stock casualty company subject to the provisions of Section 379.080, RSMo 1949. Of course, this investment statute does limit the right of the miscellaneous stock casualty company to purchase "any amount" of the capital stock of the regular life company and such limitations must also be applied to any miscellaneous mutual casualty company seeking to exercise the same power of purchase. In applying such limitations, the guaranty fund or policyholders' surplus in the miscellaneous mutual casualty company is to be considered in lieu of the capital stock fund of the miscellaneous stock casualty company.

CONCLUSION

It is the opinion of this office that a miscellaneous mutual casualty insurance company organized under Sections 379.205 to 379.310, RSMo 1949, as amended, may invest in and own all the capital stock of a regular life insurance company organized under Sections 376.010 to 376.670, RSMo 1949, as amended, and chartered to write life, health and accident insurance, but is subject to like limitations set forth in Section 379.080, RSMo 1949, applicable to stock companies.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Articles of Incorporation of Liberty Reserve Life Insurance Company.

April 20, 1959



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of April 20th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Liberty Reserve Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO:M:om

INSURANCE: Amended Articles of The Protective Life Insurance Company are in acceptable legal form.

May 26, 1959



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This opinion is in answer to your letter of May 19, 1959, transmitting certified copies of proceedings of the board of directors and stockholders of The Protective Life Insurance Company had on May 6 and 7, 1959.

A review of the proceedings submitted discloses that The Protective Life Insurance Company, a stipulated premium life insurance company, seeks to accept, pursuant to authority contained in Section 377.450, RSMo 1949, the provisions of Sections 376.010 to 376.670, RSMo 1949, Missouri's regular life insurance company law.

It is the opinion of this office that the copies of proceedings referred to in the first paragraph above are legally sufficient as to form to accomplish the desired amendment of the company's Articles of Incorporation, are in accord with the provisions of Chapter 376, RSMo 1949, and not inconsistent with the laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Domestic stock fire insurance company subject to Sections 379.010 to 379.200, RSMo 1949, as amended, may invest in the entire stock issue of a foreign fire insurance company organized for the purpose of doing any of the kinds of insurance mentioned in one of the subdivisions of Section 379.010, RSMo 1949, but qualifications and limitations found in Section 379.080, RSMo 1949, pertaining to capital stock structure, and stated percentages of assets to be invested, are applicable.

July 8, 1959



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is in reply to your inquiry reading as follows:

"A licensed domestic stock fire insurance company has requested our approval of its proposed plan to organize a wholly owned subsidiary in the state of Kansas. The subsidiary will also be a stock fire insurance company with a capitalization of \$450,000.

The domestic company which proposes this plan is a rather large insurance company. As of December 31, 1957 it had admitted assets of approximately \$10,000,000, and reserves of approximately \$2,500,000.

I hereby request your opinion as to whether the Missouri company may lawfully invest its funds in the plan described above."

The basic law of incorporation of a Missouri stock fire insurance company is found at Sections 379.010 to 379.200, RSMo 1949, as amended. In State ex rel. Missouri State Life Insurance Company v. Gehner, 320 Mo. 691, 8 S.W.(2d) 1068, the Supreme Court of Missouri alluded to the power of insurance companies to invest their assets in stocks of other corporations by using the following language found at 320 Mo. 691, l.c. 700:

"Assets in excess of reserves may, it seems, be invested in stocks of other corporations. [Laws 1927, p. 285; Laws 1925, p. 270; Secs. 6126, 6159, 6217, 6259 and 6331, R.S.1919.]"

Honorable C. Lawrence Leggett

Section 6217, RSMo 1919, referred to in the preceding quotation may now be found at Section 379.080, RSMo 1949, disclosing how the capital and other assets of a stock fire insurance may be invested. The statute just referred to has been amended since the decision in State ex rel. Insurance Company v. Gehner, supra, but each amendment has liberalized to a greater extent the power of investment. We construe the opinion request as disclosing that the stock fire insurance company will subscribe to the entire capital stock issue of the company to be formed. Such subscription to capital stock will necessarily involve an investment of the present stock fire insurance company's assets over and above its capital and surplus. This power to invest is governed solely by the provisions of Section 379.080, RSMo 1949, reading as follows:

"No company formed on the joint stock plan for the purpose of doing either of the kinds or classes of business mentioned in section 379.010, shall hereafter commence or do business with a capital of less than two hundred thousand dollars, except plate glass insurance companies and accident insurance companies, which may be permitted to do business with a capital of one hundred thousand dollars; and before any such company shall proceed to do business, the capital of such company shall be wholly paid in, and one hundred thousand dollars thereof, if a plate glass insurance or accident insurance company, and two hundred thousand dollars thereof, if any other company mentioned in said section 379.010, be held in cash or invested in treasury notes or bonds of the United States, or in bonds of the state of Missouri, or in bonds issued by any school district of the state of Missouri, or in funded bonds of any county or municipal township of this state, or in bonds and mortgages or deeds of trust on improved unencumbered real estate in this or any other state worth at least double the amount loaned thereon, the valuation of the real estate so mortgaged to be determined by the superintendent, after a personal examination, or after an examination made by some competent disinterested person specially appointed by him for that purpose; such bonds shall not be received at a rate above their actual market value; and the remainder of the capital of said companies and their other

Honorable C. Lawrence Leggett

assets may be invested either in the property or securities in this section above mentioned, or in loans safely secured by collateral worth, at its cash market value, not less than twenty per cent in excess of the amount loaned thereon, or in stocks, bonds or evidences of indebtedness issued by corporations organized under the laws of this state, or of the United States, or of any other state, or, so far as may be necessary to make deposits with the authorities of foreign countries to do business therein, the bonds of such foreign countries; provided, that no such insurance company may buy stock in any company to an amount which will give the company so buying the virtual control of any other corporation, except that any corporation organized under or for the purpose of doing any of the kinds of business mentioned in one of the subdivisions of section 379.010 may buy and hold any amount of stock in other corporations organized under or for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of said section 379.010, but it may not purchase a majority of the shares in any other insurance corporation unless it has a capital of two hundred thousand dollars in addition to the capital required by this section for each such company, the controlling interest in which is purchased, and no such company shall invest more than thirty-five per cent of the surplus to policyholders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation." (Underscoring supplied.)

We now briefly analyze Section 379.080, RSMo 1949, supra. The underscoring of language in this statute of unusual length will emphasize the points to be made. The statute commences by requiring that a stock fire insurance company, such as we are treating in this opinion, must have a fully paid capital of two hundred thousand dollars and descends into detail when outlining how such capital stock fund is to be invested. The statute then treats as its next subject "the remainder of the capital of said companies and their other assets." Underscored language discloses that such assets may be invested in stocks issued by corporations organized under the laws of "any other state," and this power is then limited

Honorable C. Lawrence Leggett

by the proviso disclosing that the investing company may not invest in the stock of any company to the extent that virtual control of the acquired company will be obtained. However, this proviso contains an exception which permits any company organized "for the purpose of doing any of the kinds of business mentioned in one of the subdivisions of section 379.010" to buy and hold any amount of stock in other corporations organized "for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of said section 379.010." This last mentioned power to buy any amount of stock is further circumscribed by language in the statute providing that if as much as a "majority" of the stock is to be purchased the purchasing company must have capital stock of two hundred thousand dollars over and above its initial capital stock of two hundred thousand dollars, or a total capital stock of four hundred thousand dollars. In addition to this capital stock requirement, the purchasing company is further limited in its power to acquire a "majority" of stock in another approved stock fire insurance company by the limitation set forth in the statute directed to a percentage of surplus to policyholders or a percentage of "surplus over and above" the acquiring company's liabilities and capital, whichever is greater. Thus we find, that after giving authority to a stock fire insurance company to purchase "any amount" of the stock of a company formed to do business under any one of the subdivisions of Section 379.010, RSMo 1949, Section 379.080, RSMo 1949, qualifies that right in instances only where a "majority" of the stock is to be purchased. Of course, such limitations as are found in the latter part of Section 379.080, RSMo 1949, will be enforced against a stock fire insurance company acquiring the entire stock issue of an insurance company formed in a foreign state for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of Section 379.010, RSMo 1949.

CONCLUSION

It is the opinion of this office that a domestic stock fire insurance company subject to the provisions of Sections 379.010 to 379.200, RSMo 1949, as amended, is authorized to invest in the entire stock issue of a fire insurance company to be organized in a foreign state and formed for the purpose of doing any of the kinds of business mentioned in one of the subdivisions of Section 379.010, RSMo 1949, but such domestic purchasing company must meet all qualifications and limitations set forth in Section 379.080, RSMo 1949, pertaining to capital stock structure and stated percentages of assets which may be invested.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

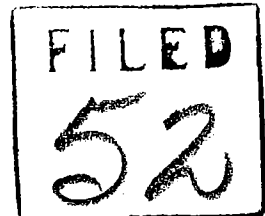
Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Articles of Agreement of Missouri Fidelity Life Insurance Company.

August 7, 1959



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of August 7, 1959, an examination has been made of an executed copy of the Articles of Agreement of the proposed Missouri Fidelity Life Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

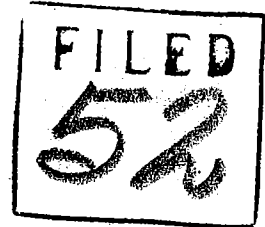
Yours very truly,

John M. Dalton
Attorney General

JLO:M:om

**INSURANCE: Amended Articles of Association of Old
American Insurance Company.**

August 7, 1959



**Mr. C. Lawrence Leggett
Superintendent of Insurance
Division of Insurance
Jefferson Building
Jefferson City, Missouri**

Dear Mr. Leggett:

**We have received your request for an opinion of this
office reading as follows:**

**"The Old American Insurance Company, a
life insurance company organized and
operating under Chapter 376 of our stat-
utes, has undertaken a revision and
amendment of its entire Articles. Be-
cause the change in the articles was
such a substantial one the company felt
it was best to publish the Articles in
the amended form in the same manner as
if it were originally incorporated.**

**"We are enclosing a copy of the follow-
ing documents which have been filed in
our office:**

- 1) Declaration of Amendment**
- 2) Shareholders Resolution adopted
at meeting of March 9, 1959**
- 3) Directors' Resolution adopted at
meeting of March 9, 1959**
- 4) Shareholders Resolution adopted
at meeting of February 9, 1959**
- 5) Directors' Resolution adopted at
meeting February 9, 1959**

Mr. C. Lawrence Leggett

- 6) Affidavit of Publication
- 7) Articles of Association (as of March 9, 1959.) Item 7 shows the various changes in the Articles which have been amended or made since the original incorporation.

"May I request your official opinion as to whether or not the amended Articles of Association comply with the provisions of Chapter 376 and whether or not same are consistent with the Constitution and laws of this state and of the United States."

We have examined the proposed amended Articles of Association of the Old American Insurance Company, together with the other documents pertaining to them, which have been submitted to us.

We are of the opinion that the proposed Articles of Association comply with the provisions of Chapter 376, RSMo 1949, and that they are consistent with the Constitution and laws of this state and of the United States.

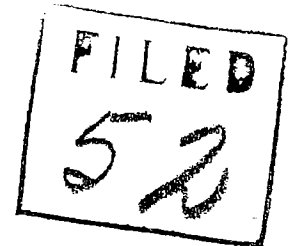
Very truly yours,

JOHN M. DALTON
Attorney General

RRW:ml
Encs.

INSURANCE: Articles of Agreement of Security Home Life Insurance Company.

August 7, 1959



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of August 7, 1959, an examination has been made of an executed copy of the Articles of Agreement of the proposed Security Home Life Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

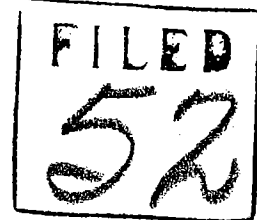
John M. Dalton
Attorney General

JLO'M:om

INSURANCE:

Articles of Incorporation of Crown Mutual Insurance Company.

August 19, 1959



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of August 18, 1959, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Crown Mutual Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:W:OH

INSURANCE: H.B. 249, 70th General Assembly, authorizing a combined fire and casualty policy will allow such combination policies to offer coverage "against all physical loss to property except as hereinafter excluded."

August 26, 1959



Honorable C. Lawrence Leggett
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry reading as follows:

"A question has risen in connection with proposed filings under the above Bill. Therefore, I am hereby asking for your opinion whether the Bill is broad enough to permit me to approve a policy which would combine fire insurance with insurance coverage as follows: 'Against all physical loss to the property except as hereinafter excluded'?

For whatever assistance it may be we think this question comes down to whether or not the insuring clause just quoted comes within the term 'allied lines' as used in line 5 of Section 1 of the Bill."

House Bill No. 249 of the 70th General Assembly of Missouri is in the following language:

"Section 1. Every insurance company licensed to do business in this state and authorized to make insurance on all three classes of insurance enumerated in section 379.010, Revised Statutes of Missouri, 1949, shall have authority to combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance which such company is authorized to make, and may charge therefor one indivisible premium or rate which may differ from

Honorable C. Lawrence Leggett

the aggregate premium or rate applicable to separate policies covering the same property and risk or risks, and the difference in rates or premiums shall not be deemed to be unfairly discriminatory under the provisions of Chapters 375 and 379, Revised Statutes of Missouri, 1949: provided, however, that any company issuing any policy combining coverages including protection against the peril of fire shall not discriminate unfairly between risks of essentially the same hazards and having substantially the same degree of protection.

Section 2. No company shall issue such a policy combining the perils of fire and allied lines with any one or more perils of casualty insurance until after it has submitted each combination of coverages to the Division of Insurance for the Superintendent's approval or disapproval, and for establishing the public rating record to be maintained by each such company or insurer, or as may be similarly provided for, established and maintained by an actuarial bureau, and all combination of coverages approved by the Superintendent shall be regulated by the provisions of Sections 379.315 to 379.415, Revised Statutes of Missouri, 1949, which are not inconsistent with the authority herein granted."

The law quoted above is clearly directed to every insurance company licensed to do business in Missouri on all three classes of insurance enumerated in Section 379.010, RSMo 1949, and companies writing a combination of risks referred to in the cited statute have long been referred to as miscellaneous casualty companies with multiple line writing privileges. In your request for the opinion you refer to coverage against "all physical loss to the property except as hereinafter excluded," and seek to determine if such loss may be combined with fire insurance coverage under the language found in House Bill No. 249, supra.

It is apparent from the language of House Bill No. 249, that the legislative purpose was to authorize the described companies to "combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance"

Honorable C. Lawrence Leggett

which those companies are authorized to write. The authority to combine the perils of "fire and allied lines" with "casualty insurance" in a single policy is very much in evidence from the plain wording used. Simply stated, will a comprehensive and generally accepted definition of "casualty insurance" embrace "all physical loss to property"?

At 44 C.J.S., Insurance, Sec. 6, we find the term "casualty insurance" treated in the following language:

"Although 'casualty insurance' is a term of quite frequent use, it cannot be said that its definition has been very accurately settled by the courts. It is commonly held to include those forms of indemnity providing for payment for loss or damage to property, except from fire or the elements, resulting from accident or some such unanticipated contingency, and for loss through accident, or casualties resulting in bodily injury or death. The term, however, is more properly applied to insurance against the effects of accidents resulting in injuries to property."

In Vol. 1, Couch on Insurance, Sec. 13, we find the following:

"In some jurisdictions a distinction, largely based on statutes, is drawn between accident and casualty insurance, the former being held to relate to accidents resulting in bodily injury or death, and the latter to property losses resulting from accident or casualty, such as boiler, plate glass, injury to property by strikes, etc. But as a general rule 'casualty insurance' covers accidental injury both to persons and to property. In fact casualty insurance has been defined as an insurance against loss through accidents or casualties resulting in bodily injury or death."

From the foregoing definitions directed to the term "casualty insurance," we find that the only property loss not comprehended in the definition is loss or damage to property occurring from "fire or the elements," and such loss or damage to property is covered by insurance against the perils of "fire and allied lines." Perils of

Honorable C. Lawrence Leggett

casualty insurance are indeed numerous, depending on the known, as well as yet undiscovered, causes bringing about the casualty, but in every casualty involving damage to property there is a consequent physical loss to property to a greater or lesser degree. To assume that the broad definition of casualty insurance referred to above might be further restricted in its meaning to exclude physical loss to property which is the subject of ocean marine, inland marine or transportation insurance coverage, would ignore the fact that in a casualty policy directed to physical property the indemnity will be measured by the value of the property lost or injured, and the perils of loss are merely descriptive in name in order to bring the loss within the insuring clause of the policy.

Conclusion.

It is the opinion of this office that House Bill No. 249, passed by the 70th General Assembly of Missouri, giving authority to combine in single policies of insurance the perils of fire and allied lines with any one or more perils of casualty insurance, will allow such combination policies to offer coverage "against all physical loss to the property except as hereinafter excluded."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

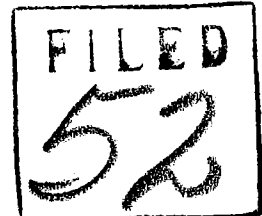
John M. Dalton
Attorney General

JLO'M:cm

INSURANCE: A fire insurance company, subject to Missouri's fire Rating Act, maintaining its own public rating record, and choosing to establish its own audit division to audit its daily reports, is amenable to periodic examination by the Superintendent of the Division of Insurance to insure compliance with the Rating Act, or, in the alternative, may be directed by the Superintendent to order and instruct its agents to forward each day copies of their daily reports to the Division of Insurance where they may be checked against the public rating record of the company in order to determine if deviation or discrimination in rates is shown in the light of such public rating record.

August 28, 1959

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry reading as follows:

"An insurance carrier has objected to using the facilities of the Missouri Audit Bureau which was established in 1917 at the direction of the Superintendent of Insurance. The Bureau is independent of the Division of Insurance and audits fire and allied lines daily reports to determine whether subscriber companies have complied with their public rating records filed with the Division of Insurance.

The insurance carrier involved maintains its own public rating record with this Division, and desires to audit its own daily reports. I would like your opinion whether the law permits this."

The foregoing inquiry contemplates fire insurance companies and requires a construction of various provisions of Missouri's fire Rating Act found at Sections 379.315 to 379.415, RSMo 1949, as amended.

An illuminating statement concerning the circumstances under which the Missouri Audit Bureau came into existence, and its functions, is found in State ex inf. Taylor v. American Insurance Company, 355 Mo. 1053, 1.c. 1070-1072, 200 S.W.(2d) 1.

Section 379.350, RSMo 1949, provides as follows:

"No company or other insurer or agents shall directly or indirectly, by any special rate,

Honorable C. Lawrence Leggett

tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly between risks of essentially the same hazard and substantially the same degree of protection."

In State ex inf. Taylor v. American Insurance Company, supra, the Supreme Court of Missouri referred to Section 5979, RSMo 1939, now found unchanged at Section 379.350, RSMo 1949, quoted above, and disclosed the use made of the Missouri Audit Bureau in the following language found at 355 Mo. 1053, l.c. 1071:

" * * * Section 5979 requires all insurance policies to be written at a rate as indicated by its public rating record. As we view the situation the State Insurance Superintendent has been and is using the Missouri Audit Bureau as an instrument for enforcing this statute, that is, Sec. 5979. * * * The object accomplished by the activities of the Audit Bureau may be the forcing of all companies to charge the approved rates and use the forms and binders as approved and filed. But that is a compliance with the statute and not a violation. The record shows that the Audit Bureau uses the public rating record of the Missouri Inspection Bureau and the rating record as filed in the Insurance Department by the various companies as a check against the daily reports filed by the agents and thus the Audit Bureau determines if the approved rate has been charged and the proper forms used. * * * "

Section 379.315, RSMo Supp. 1957, provides as follows:

"1. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss

Honorable C. Lawrence Leggett

by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon.

2. Such rating record shall include, insofar as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice.

3. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement.

4. Such rating record shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the makeup of such rate.

5. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon request furnish to the holder thereof a written or printed analysis of the rate of premium charged for such policy, showing the items of charge and credit which determine the rate."

The public rating record required by Section 379.315, RSMo Supp. 1957, supra, may be maintained by each company, or any company may use a public rating record maintained by an actuarial bureau, and such power is found in Section 379.320, RSMo 1949, reading as follows:

"For this purpose each company or other insurer shall be permitted to maintain its own

Honorable C. Lawrence Leggett

public rating record or to use a public rating record maintained by an actuarial bureau; provided, such record shows the true and correct rate charged by such company or insurer; and provided further, that no company or other insurer may directly or indirectly by any agreement, contract, understanding or otherwise agree with any other company, insurer, or actuarial bureau to continue to use the rating record of any actuarial bureau or to refrain from maintaining its own rating record, or to maintain the rates fixed by any such actuarial bureau."

From statutes quoted above, we find that a fire insurance company may maintain its own public rating record, and Section 379.335, RSMo 1949, requires that a copy of such rating record be filed with the superintendent of insurance, such requirement being in the following language:

"4. Copies of all public rating records, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of sections 379.315 to 379.415, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day."

While the object accomplished by the Missouri Audit Bureau over a period of many years may be forcing all companies to charge the approved rates and to use the forms and binders as approved and filed as a part of their public rating record, as was indicated in language used by the Court in *State ex inf. Taylor v. American Insurance Company*, cited supra, we find no provision in the fire Rating Act or other statutes in the insurance code of Missouri authorizing the establishment of the Missouri Audit Bureau, nor have we found any statute requiring that daily reports of fire insurance company agencies be audited. However, the fire insurance industry over a long period of time has, by use of the services of the Missouri Audit Bureau, demonstrated the fact that only by such

Honorable C. Lawrence Leggett

daily auditing may the Superintendent of the Division of Insurance, as well as competitors in the field, be fully aware of any deviations from public rating records or discriminations in the matter of applying rates to risks.

The wisdom of this daily auditing is further attested to by the disclosure in your letter of inquiry that the fire company in question desires to operate its own auditing division to audit its own daily reports. In this suggested procedure, we find basic error, unless the Superintendent of the Division of Insurance is able to check such daily reports by his own employees or agents. For over forty years, the Missouri Audit Bureau, formed at the suggestion of the Superintendent of Insurance, has served, and continues to serve, as an unofficial agent of the Superintendent in reporting to him violations of the fire Rating Law by members of the fire insurance industry accepting the services of the Missouri Audit Bureau, and the character of the Bureau, as an impartial agent reporting violations to the Superintendent has not been suggested. It is imperative that an agency independent of the company check such company's compliance with the law. The basic responsibility for checking compliance with this law is in the Superintendent of the Division of Insurance. The fact that he has been assisted in this task, but by no means relieved of it, by an independent agency such as the Missouri Audit Bureau, does not in the least lessen his responsibility in those instances where a company does not desire to avail itself of the services of the Missouri Audit Bureau.

We now look for statutory authority vested in the Superintendent to cope with a situation such as outlined in your letter of inquiry, and it is found in Section 379.330, RSMo 1949, reading as follows:

"1. All rating or actuarial bureaus, whether maintained by one or more companies, shall be subject to the visitation, inspection and examination of the superintendent of insurance, and he is hereby authorized and empowered to make examinations thereof, as often as he deems expedient, and the expense and cost of such examinations shall be paid by the rating bureau examined in such manner as is now required of insurance companies in their examinations.

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2. The superintendent of insurance may address inquiries to any company, insurer or rating bureau which is, or has been, engaged in making rates or estimates for rates for fire insurance upon property in this state in relation to the organization, maintenance and operation thereof, or any other matter connected with its transaction, and may require the filing of such schedules, rates, forms, rules, regulations, agreements or any other information which he may direct, and it shall be the duty of every such company insurer or bureau to promptly make such filing and reply to such inquiries in writing."

The foregoing statute, Section 379.330, RSMo 1949, when considered in the light of the language and purpose of Missouri's fire Rating Act, vests authority in the Superintendent of the Division of Insurance to make periodic examinations of an auditing division set up by an individual fire company in order to check daily reports of fire business against the public rating record maintained by such company. An alternative procedure will permit the Superintendent of the Division of Insurance to order and direct such a company to instruct its agents to forward each day copies of their daily reports to the Division of Insurance where they may be checked against the public rating record of the company in order to determine if deviation or discrimination in rates is shown in the light of such public rating record.

CONCLUSION

It is the opinion of this office that a fire insurance company, subject to Missouri's fire Rating Act, maintaining its own public rating record, and choosing to establish its own audit division to audit its daily reports of fire business, is amenable to periodic examination by the Superintendent of the Division of Insurance to insure compliance with the Rating Act, or, in the alternative, may be directed by the Superintendent to order and instruct its agents to forward each day copies of their daily reports to the Division of Insurance where they may be checked against the public rating record of the company in order to determine if deviation or discrimination in rates is shown in the light of such public rating record.

Honorable C. Lawrence Leggett

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

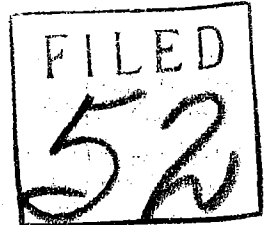
Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Foreign insurance company reinsuring stipulated premium plan life insurance business, ceded to it by Missouri stipulated premium plan life company surrendering its charter, is liable to assessment of a Missouri premium tax on such business under Missouri's retaliatory law, Section 375.450, RSMo Supp. 1957.

November 12, 1959



Honorable G. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry reading as follows:

"On or about November 30, 1954, Jackson Life Insurance Company, a regular life company domiciled in the State of Arkansas and licensed to do business in Missouri, reinsured the stipulated premium plan business of Jefferson Central Life Insurance Company, a Missouri stipulated premium plan company. Assumption certificates were issued by the Arkansas company directed to the reinsured business.

"The stipulated premium plan contracts are continued in force by this Arkansas company, along with regular life business, as it continues to be licensed as a foreign company to do business in Missouri. The Arkansas company resists payment of a 2 1/2% premium tax assessed against it by this Division in relation to the stipulated premium plan business, referred to above, for the years 1956, 1957 and 1958. Such tax was assessed on a retaliatory basis, and your opinion is requested as to the legality of such assessment."

It is apparent from the above inquiry that Jackson Life Insurance Company, a regular life insurance company, was domiciled in the State of Arkansas; that it was licensed to conduct its business in Missouri as a foreign corporation in 1956, 1957 and 1958; that part of the business it conducted in Missouri during those years consisted of servicing contracts of insurance originally written by Jefferson Central Life Insurance Company, a Missouri stipulated

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premium plan life insurance company, but which contracts were re-insured and assumed by Jackson Life Insurance Company under a re-insurance agreement entered into in November, 1954; and that the Arkansas company resists the premium tax assessed against it in relation to those contracts for the years in question.

For the purpose of this opinion, we may assume that the stipulated premium contracts did not change character by reason of the reinsurance agreement, and had such contracts continued to be carried out by the Jefferson Central Life Insurance Company, a Missouri stipulated premium plan company, a domestic premium tax in Missouri would not have been applied to such business because of the assessment potential applicable to such contracts and found in Missouri's stipulated premium plan law at Section 377.260, RSMo 1949. This principle of premium tax exemption as to domestic stipulated premium plan life companies in Missouri is clearly stated in an opinion of this office directed to you under date of May 4, 1955.

Paragraph 14 of the reinsurance agreement between Jackson Life Insurance Company and Jefferson Central Life Insurance Company, approved by the Superintendent of the Division of Insurance of Missouri and the Commissioners of Insurance of the States of Arkansas and Tennessee under date of November 23, 1954, contained the following:

" * * * It is further ORDERED that as soon as practicable the Jefferson Central Life Insurance Company shall cease doing business and surrender its charter."

The foregoing provision is evidence that Jefferson Central Life Insurance Company ceded its stipulated premium plan business to Jackson Life Insurance Company for the purpose of having the Arkansas company take over and reinsure such business and to service the same as though it had originated the business in the first instance. Jefferson Central Life Insurance Company did cease business as a licensed insurance company within a reasonable time after the reinsurance agreement of November, 1954, and it must be reasonably concluded that Jackson Life Insurance Company, in servicing the contracts in question and collecting premiums due thereon from Missouri policyholders, was conducting its business in Missouri as a foreign company licensed to do business in Missouri. As to the business in question, the Arkansas company is not in a position to contend that it was not conducting such stipulated premium plan business as any other foreign company would be doing in Missouri. This being so, the Arkansas company would find that Section 377.430, RSMo 1949, a

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part of Missouri's stipulated premium plan law, taxes foreign stipulated premium plan companies in the following language:

" * * * 2. Neither shall any foreign corporation, company, association or society be authorized to do business in this state under sections 377.200 to 377.460, unless it collects in advance for the benefit of its policyholders a net premium equal to at least that provided for by the terms of sections 377.200 to 377.460; provided, that all such foreign corporations shall annually pay a tax on the gross premiums received in this state on account of business done in the state at the rate of one per cent per annum, which shall be in lieu of all other taxes as herein otherwise provided; said tax shall be levied and collected as is provided for in the collection of taxes on other insurance companies."

You have indicated that a premium tax was assessed on the business in question in the years 1956, 1957 and 1958 on a retaliatory basis.

Missouri's general retaliatory law applicable to all foreign insurance companies doing business in Missouri is found at Section 375.450, RSMo Supp. 1957, in the following language:

"1. When by the laws of any other state or foreign country any premium or income or other taxes, or any fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions are imposed upon Missouri insurance companies or carriers doing business, or that might seek to do business in such other state or country, which in the aggregate are in excess of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon insurance companies of such other state or foreign country under the statutes of this state, so long as such laws continue in force, the same obligations, prohibitions, and restrictions of whatever kind shall be imposed upon insurance

Honorable G. Lawrence Leggett

companies or carriers of such other state or foreign country doing business in Missouri. Any tax, license or other obligations imposed by any city, county or other political subdivision of a state or foreign country on Missouri insurance companies or carriers shall be deemed to be imposed by such state or foreign country within the meaning of this section, and the insurance commissioner for the purpose of this section shall compute the burden of any such tax, license or other obligations on an aggregate statewide or foreign-countrywide basis as an addition to the tax and other charges payable by similar Missouri insurance companies or carriers in such state or foreign country. The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes.

2. All licenses, fees, taxes, fines or penalties collectible under this section shall be paid to the collector of revenue."

Section 66.604, Arkansas Statutes, 1947, Annotated, provides:

"Every foreign or alien life, accident, life and accident, health and accident, or life, health and accident insurance company, corporation or association, and every casualty company, corporation or association, authorized to do business in this State, shall file with the Commissioner at the same time it makes its annual statement, a sworn statement of its gross premium receipts in this State for the year ending the 31st day of December next preceding, and on such gross receipts each of said companies shall pay into the State Treasury on or before the first day of March, 1947, and annually on or before the first day of March thereafter, a tax of two and one-half per centum [2 1/2%] on such gross receipts as a privilege tax for the privilege of transacting business in this State. No certificate of authority shall be issued to any such company

Honorable C. Lawrence Leggett

until said tax is paid. Said tax shall be in lieu of all other taxes, State, county or municipal, based on such gross premium receipts, nor shall any city, town or municipality impose any license fees or privilege tax upon any such company, or the agent of any such company, for the privilege of transacting such business of insurance. In estimating such gross premium receipts, said companies shall not take credit for any dividends, under whatever name called, paid policy holders for surrender of policies. The purpose of this law is to impose a tax of two and one-half per centum [2 1/2%] on the gross receipts of every insurance company coming within the description herein above given, whether such premium receipts be in cash or in the shape of notes or other evidences of credit. Provided that it is not the intention of this act to levy a tax of more than 2% on premiums other than life, health and accident insurance.

"Twenty per cent [20%] of the revenue derived under this section shall be deposited in the State Treasury to the credit of a fund known as the 'Sanitation Fund of the State Board of Health.' Eighty per cent [80%] shall be deposited in the State Treasury to the credit of the General Revenue Fund now provided by law; provided, that in the preparation of joint budgets an amount equal to twenty-five per cent [25%] of the allocation from the 'Sanitation Fund of the State Board of Health' be set aside for the purchase of drugs, biologicals, etc., for the treatment of the indigent sick when necessary, at the discretion of the county judge. And provided further, that no personnel shall be appointed to a county without the approval of the county judge."

It is evident from language appearing in the Arkansas statute referred to above that no exemption from premium tax is accorded to life insurance business written on the stipulated premium plan by any foreign company doing such business in Arkansas; and life, health and accident insurance is to bear the maximum rate of premium tax therein provided, to-wit, 2 1/2%.

Honorable C. Lawrence Leggett

Only by applying the 2 1/2% premium tax to the business in question for the years 1956, 1957 and 1958 can you fully carry out the directives contained in Section 375.450, RSMo Supp. 1957, and it is the opinion of this office that an assessment made in conformity with provisions of such statute constitutes a legal assessment.

CONCLUSION

It is the opinion of this office that Jackson Life Insurance Company, domiciled in the State of Arkansas and reinsuring stipulated premium plan life insurance business ceded to it in 1954 by Jefferson Central Life Insurance Company, a Missouri stipulated premium plan company surrendering its charter, is liable to assessment on such business for premium taxes for 1956, 1957 and 1958 at the rate of 2 1/2% under Missouri's retaliatory law, Section 375.450, RSMo Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'N:om

AGRICULTURE: Potash producers and other suppliers of unmixed
FERTILIZER: fertilizer materials who sell those materials to
DISTRIBUTORS: a distributor registered under Sections 266.290
through 266.350, RSMo Cum. Supp. 1957, but who
make deliveries of those fertilizer materials to
"blenders" or ultimate consumers on orders placed
with such a distributor are not to be considered
distributors within the provisions of Sections
266.290 through 266.350, RSMo Cum. Supp. 1957.

May 1, 1959



Mr. J. H. Longwell, Director
Missouri Agricultural Experiment Station
Division of Agricultural Science
University of Missouri
Columbia, Missouri

Dear Mr. Longwell:

This is in response to your letter of April 1, 1959, in which you make a request as follows:

"We will appreciate your opinion concerning the interpretation of the Missouri Fertilizer Law of 1953, Section 266.290, paragraph (2) and Section 266.300.

"Potash producers and some other suppliers of unmixed fertilizer materials at present are offering such materials for sale only to distributors who hold permits which have been issued by the Director in compliance with provisions of Section 266.300. The producers do not hold permits. In many instances the materials which are sold by producers to distributors are shipped by the producer directly to non-registered dealers in Missouri who sell directly to farmers. The materials are billed to the registered distributors who report the shipments and pay the fees in compliance with Section 266.320. The distributors do not handle the materials but act essentially as brokers between the producer and the dealers. The materials are shipped into the state in bags or bulk under the label and guarantee of the producer.

Mr. J. H. Longwell

"Until about two years ago substantially all unmixed fertilizer materials were shipped directly from the producer to the distributor. The distributor either used these materials in mixed fertilizers which were sold under the name and guarantee of the distributor or were resold as straight materials. The new shipping practice has developed in recent years because of the extensive development of blending. This practice, blending, consists of mixing materials by a relatively small operator in a local community, who mixes materials as requested by individual farmers.

"I am of the opinion that under these conditions the producer becomes a distributor under the terms of the law and should be required to register as a distributor."

Section 266.290 [1,2], RSMo Cum. Supp. 1957, reads as follows:

"The following words, terms, and phrases, when used in sections 266.290 to 266.350 have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"(1) 'Person' includes individuals, partnerships, associations, firms corporations, estates, trusts, receivers, or trustees appointed by any state or federal court.

"(2) 'Distributor' means any person who imports, consigns, manufactures, produces or compounds fertilizer, or offers for sale, sells, barter, or otherwise supplies fertilizers for consumption or use in this state; provided that this term shall not apply to any person who purchases fertilizer from a distributor registered under sections 266.290 to 266.350 and which fertilizer has been once sold in compliance with sections 266.290 to 266.350."

Section 266.300, RSMo Cum. Supp. 1957, reads as follows:

Mr. J. H. Longwell

"It shall be unlawful for any distributor to sell, offer for sale or expose for sale for consumption or use in this state any fertilizer without first securing a permit from the director. Such permit shall expire on the thirtieth day of June of each year. Application for such permit shall be on forms furnished by the director."

In reaching our conclusion we first wish to bring to your attention the purpose of this law which is set forth above in Section 266.300. You will observe that it is unlawful for any distributor to sell, offer for sale or expose for sale for consumption or use in this state any fertilizer without first securing a permit from the director. It is our belief that the words "for consumption or use" were intended to be restrictive as a part of the definition of the term "distributor". You will observe throughout Sections 266.290 through 266.350 that these words "for consumption or use" are used frequently as a means of expressing the purpose for which the fertilizers were sold by the distributor. Black's Law Dictionary, 4th Edition, defines consumption as an act or process of consuming; waste; decay; destruction; and using up of anything as food, heat or time. It cites several cases in support thereof. We believe that the cases which have attempted to define consumption or use demonstrate that those terms mean that final or ultimate purpose to which the goods are intended to be put. Therefore, it would appear that a distributor is a person who sells or otherwise supplies fertilizers to a person who intends to utilize those fertilizers ultimately and for the purposes for which they are intended, i.e., increased plant growth, etc. It is our view that the person who so disposes of the fertilizer in this State is a distributor, and it would make no difference if the fertilizer were to be shipped directly to the farmer by the producer or if it were shipped by the producer to the distributor and then by the distributor to the ultimate consumer so long as the ultimate consumer makes his purchase from the distributor.

The Fertilizer Act would appear to be based upon a situation in which there exists those persons commonly noted as distributors and those persons commonly noted as producers. We do not believe that it was intended that those persons who are normally considered producers be registered as distributors, even though those producers make deliveries directly to a consumer on orders placed with a distributor. Of course a producer

Mr. J. H. Longwell

who sells directly to the consumer would be a distributor and would be required to be licensed under this Act. It is conceivable that in some circumstances the person whom you designate as a blender might be considered a distributor if that blender is the one who sells to the ultimate consumer. However, because of the proviso in the definition of the term distributor, this blender would not be subject to the terms of this Act when he makes his purchases from a distributor registered under the sections of this Act.

CONCLUSION

Therefore, it is the opinion of this office that potash producers and other suppliers of unmixed fertilizer materials who sell those materials to a distributor registered under Sections 266.290 through 266.350, RSMo Cum. Supp. 1957, but who make deliveries of those fertilizer materials to "blenders" or ultimate consumers on orders placed with such a distributor are not to be considered distributors within the provisions of Sections 266.290 through 266.350, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

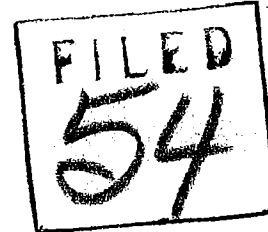
JOHN M. DALTON
Attorney General

JB3:mc

STATE PURCHASING AGENT:

The state purchasing agent need not consider a bid proposal for public printing which does not substantially conform to the specifications upon which bids were solicited and received.

May 20, 1959



Honorable Elwood Long
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Long:

Reference is made to your request for an official opinion, which opinion request reads as follows:

"This office has recently submitted a request for bids for a certain publication. Complete specifications and also a copy of the previous publication was submitted at that time. Upon opening the sealed bids it was noted that four firms had submitted bids that met the specifications as submitted. One of the four firms had submitted an alternate bid that was considerably lower, but they had changed the specifications as to the sheet size by reducing the size of the publication from size 8-1/2" x 11" to 8-3/8" x 10-7/8".

"I would like to have an opinion particularly on Section Number 34.200, which deals with specifications and the awarding of contracts. Because as in the past this office, in regard to printing, had made it a policy not to make awards on an alternate bid, when the bids were submitted meeting the specifications."

We understand your question to be whether you should consider a proposal for public printing which varies from the specifications upon which bids were requested or whether a bid which varies from the specifications should be rejected.

From the information submitted with your opinion request, it appears that the specifications upon which bids were requested

Honorable Elwood Long

call for "Pages and cover to be 8 1/2" x 11" trimmed size." One bidder submitted a bid conforming in all respects with the specifications, including the item above noted. This bidder also submitted an alternate bid on the same proposal, which alternate bid reads as follows:

"ALTERNATE BID

12 Monthly Issues, trim size 8 3/8 X 10 7/8
printed web fed offset on inside 15
pages. Cover printed sheet fed offset.
All other specifications remain the
same,-----\$-----."

Suffice it to say that this "alternate bid" is substantially lower in total price than any of the other bids submitted. Further, all other bids conform to the specifications as written. Section 34.210, RSMo 1949, provides that the state purchasing agent shall have the public printing of the state executed upon competitive bids and reads as follows:

"The state purchasing agent shall have the public printing of the state executed upon competitive bids, and shall award the contract to the lowest responsible bidder and shall in all instances reserve the right to reject any and all bids; provided, that printing jobs of less value than fifty dollars may be purchased on the open market if approved by the comptroller. The purchasing agent may combine orders or subdivide individual jobs for the purpose of advertising and contracting as shall be to the best interests of the state. The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. Bonds satisfactory to the purchasing agent shall be given by the parties to whom contracts are awarded, to secure the faithful performance of such contracts."

Section 34.200, RSMo 1949, provides that the state purchasing agent shall invite bids upon specifications which he has prepared and that any contract which is awarded shall be upon such specifications. Said section more fully provides as follows:

"The state purchasing agent shall prepare specifications for all printing to be contracted for and shall invite all bids and let all contracts upon such specifications which shall be a part of each contract and shall

Honorable Elwood Long

not be changed or modified after the contract is awarded. Such specifications prepared by the purchasing agent shall state clearly and distinctly the kind and character of the work to be done, the quality of paper desired, the number of copies to be furnished, and wherever possible shall have attached a sample of previous issues of the publication or form. Copies of such specifications shall be made available to all bona fide applicants therefor."

The public policy underlying statutory requirements that all contracts be awarded only after competitive bidding is succinctly stated in the case of Case v. Inhabitants of Trenton, 74 A. 672, wherein the court stated:

"We must consider the public policy which underlies the requirements of competitive bidding. The purpose of the statute requiring competitive bidding is that each bidder, actual or possible, shall be put upon the same footing. The municipal authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited and the proposals submitted. If one bidder is relieved from conforming to the conditions which imposes some duty upon him, or lays the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions. * * *"

The duties of public officials with relation to letting contracts upon competitive bids are set out in Collier v. City of St. Paul, 26 N.W.2d 835, 1.c. 840, as follows:

"Statutory and city charter provisions requiring competitive bidding in the letting of public contracts require, as necessary corollaries, that the public officials whose duty it is to let a contract should adopt definite plans and specifications with respect to the subject matter of the contract; that the plans and specifications be so framed as to permit free and open bidding by all interested parties; that a bid shall constitute a definite offer for the contract which can be accepted without further negotiations; and

Honorable Elwood Long

that the only function of the public authority with respect to bids after they have been received shall be to determine who is the lowest responsible bidder. (Citing cases) It necessarily follows also that a bid must conform substantially to the advertised plans and specifications, and that where there is a substantial variance between the bid and the plans and specifications it is the plain duty of the public authority to reject the bid."

The foregoing principles of law and statutory provisions considered, we are of the opinion that your office need not consider a bid which deviates from the specifications upon which bids were solicited and that the "alternate bid" above referred to should be rejected. First, an award based upon this proposal would not be a contract based upon the specifications as required by Section 34.200, supra. Second, a contract based upon this "alternate" proposal would not be executed upon competitive bids as required by Section 34.210, supra. There simply would be no basis for comparison of bids since no other bids have been called for or received for "trim size 8 3/8 X 10 7/8" as set out in the "alternate" proposal. Who can say what the other proposals would have been if submitted upon this specification or whether this "alternate bid" would have been the lowest responsible bid if all bids had been submitted upon this specification?

CONCLUSION

Therefore, it is the opinion of this office that the state purchasing agent need not consider a bid proposal for public printing which does not substantially conform to the specifications upon which bids were solicited and received.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

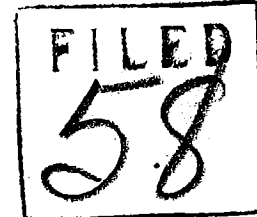
John M. Dalton
Attorney General

DDG:hw:lvd

COUNTY CLERKS:
FEES IN REGARD TO
DRAINAGE DISTRICTS:

Additional fees provided for county clerks under Section 246.030, providing for fees paid to the county clerk in connection with drainage districts are to be construed to include extension.

March 31, 1959



Honorable Leon McAnally
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This is in response to your request of January 12, 1959, regarding an opinion as to fees for county clerks under Section 246.030, which request reads as follows:

"The opinion of your office is desired in the matter discussed herein below.

"Levee District No. 7 in Dunklin County is a levee district organized by the County Court. Each year the county clerk makes up the tax books of Levee District No. 7 by entering in the tax books the assessment levy of Levee District No. 7.

"The question has now arisen as to whether the county clerk is authorized to charge the levee district the sum of eight cents per hundred words and numbers for making the entries of the levee assessment on the tax books.

"It is agreed that if the county clerk can make such charge it is by virtue of Section 246.030 V.A.M.S. The question then is whether or not this section authorizes said charge under this set of facts."

An examination of the Missouri Constitution of 1945 indicates that there is no Missouri constitutional issue involved in this matter, but, rather, it is a matter of statutory construction.

Honorable Leon McAnally

The full text of Section 246.030 reads as follows:

"The county and circuit clerks, except as limited in section 246.020 and otherwise specified in statutes governing the organization and administration of drainage and levee districts, shall receive (in addition to the fees and deputy hire allowed by law) for filing each paper relating to a drainage or levee district, five cents; for issuing each subpoena, summons or notice, and for approving and filing each bond, twenty-five cents; for recording or copying each one hundred words and numbers, eight cents, any number consisting of more than three figures to be considered as two numbers. The fees of the sheriffs and witnesses shall be the same as allowed in section 246.020."

Section 246.030 has been underscored by this writer in two portions; the first being the limitation which this statute itself restricts the additional fees granted to county and circuit clerks under this section, and the second underscored portion being in reference to the only fee under this provision which might apply to the entry of the levee assessment.

It is clear from an examination of the second portion of Section 246.030, underscored, that it is the only possible fee under that statute which might be charged for making the entry of the levee assessment on the tax books. Therefore, an examination of the first portion, underscored above, must be made to ascertain whether or not this can be construed as an additional fee pertaining to the entry of the levee tax by the county clerk.

Two possible limitations are contained in the first portion underscored in Section 246.030. First, such possible limitations as Section 246.020 may make, and, secondly, possible limitations in other statutes governing the organization and administration of the levee districts.

You will note that Section 246.020 purports to grant additional fees to county and township officers for services rendered to drainage districts. However, it limits additional

Honorable Leon McAnally

fees to a "reasonable compensation to be fixed by the court." It does not specifically limit the sections following (Section 246.030, pertaining to county clerks; Section 246.040, pertaining to county collectors; Section 246.050, relating to county treasurers' fees). Consequently, since the three sections following Section 246.020 are specific in their nature, i.e., pertain to specific county officers, these statutes would govern over the general statute providing for additional fees for county officers as to those particular officers. This being the situation, it is readily seen that Section 246.030, the statute governing fees for county clerks, is in no way limited by the wording of Section 246.020 except as to possible services which could be performed by the county or circuit clerk which would differ or fail to fit into the categories enumerated in Section 246.030. Since we have construed the statutes relating to additional fees for services performed for drainage districts which might, in themselves, limit the additional fees granted, we next pass to the question of whether the statutes governing the organization and administration of levee districts in any way limit this provision.

Section 245.445 provides that, after assessment by the board of directors of the levee district, the assessment books are to be delivered to the clerk, whose duties are:

" * * * the secretary of the board, under his official seal, shall cause a certified copy of said order to be transmitted to the clerk of the county court in which said levee district shall be situated, and in case such levee district shall be situated in two or more counties, then to the clerk of the county court of each county in which any portion of said district may be situated; and the said tax shall be extended on the tax books of the county on the real estate to be benefited, situated in said levee district, in the same manner that other taxes are now extended, in a column under the head of 'Levee fund tax,' * * *."

This, of course, is the act of which you are inquiring and request that we decide whether the same is subject to the fee provided under Section 246.030 for "recording or copying."

Honorable Leon McAnally

The clerk's duties as to extension are governed by Section 137.290. It is a distinct and separate act of the clerk, to be performed by him, not the "copying" of someone else's figures, but the computation of the taxes from the figures given to him by the assessor and placed by him on the assessor's books. To "copy" is defined in 13 C.J., 935, as :

"To make a copy or copies of; to write, print, engrave, or paint after an original; to duplicate; to reproduce; to transcribe; as to copy a manuscript, inscription, design, painting, etc.; to make a copy of [a picture or other work of art]; to reproduce or represent [an object] in a picture or other work of art."

In contrast, the word "record" is defined in 76 C.J.S., at 107, as:

"As a verb the word 'record' is defined as meaning to commit to writing, to printing, to inscription, or the like; to enter in a book for the purpose of preserving authentic and correct evidence of the thing recorded; * * *."

It appears to us that the clerk, in entering the amount of levee tax upon the tax books, "commits to writing" the amount of such tax and enters it there "for the purpose of preserving authentic and correct evidence" of the amount of such tax.

CONCLUSION

Therefore, it is the opinion of this office that the act of making the entries of the levee taxes on the tax books is the act of "recording" within the meaning of Section 246.030, RSMo 1949. Consequently, county clerks are to receive the fee prescribed by that section in recompense for the duties imposed upon them in preparing levee district tax books.

Very truly yours,

JOHN M. DALTON
Attorney General

JEB:lcm

STATE BOARD OF
COSMETOLOGY:

Any registered operator is qualified to train an apprentice in any of the classified occupations governed by the cosmetology laws. Those who train an apprentice are not subject to the provisions of Section 329.080 VAMS, requiring an instructor's license to teach the classified occupations.

October 5, 1959



Mrs. Jakaline McBrayer
Executive Secretary
State Board of Cosmetology
Capitol Building
Jefferson City, Missouri

Dear Mrs. McBrayer:

This is in reply to your recent inquiry relating to whether a person who instructs apprentices in their cosmetologist's or manicurist's establishment must also be licensed as an instructor. Your inquiry reads:

"The Board Members have ask that I write you for a written opinion on our new Law, Senate Bill 283(enclosed), Section 329.040 Sub Paragraph 3 and Section 329.080 Sub paragraph 1. Relative to persons who must hold instructors licenses in order to teach cosmetology."

After ascertaining by phone in more particularity the facts relating to your inquiry, we have rephrased your question as follows: Do the provisions of paragraph 3, Section 329.040, VAMS, relating to the training of cosmetologists by apprenticeship conflict with paragraph 1 of Section 329.080, VAMS, requiring that persons teaching such occupation shall be registered as an instructor or, if a person is trained by apprenticeship rather than a cosmetology school, does the person instructing the apprentice in such occupation also have to be a licensed instructor, whether or not such person holds himself out as conducting a school for cosmetologists?

So that we may better determine the answer to this question, we shall examine both provisions in detail. These sections read, in part:

"329.040. Certificate of registration for school required, fee standards

* * * * *

Mrs. Jakaline McBrayer

3. Nothing contained in this chapter shall prohibit registered operators within a hair dressing or cosmetologist's or manicurist's establishment from teaching any of the practices of the classified occupations in their regular course of business, provided the owner or manager thereof does not hold himself out as a school and does not hire or employ or teach regularly at any one and the same time, more than one apprentice to each operator regularly employed within their business, and said owner or manager does not accept any fee for instruction. As amended Laws 1959, p. --, S.B. 283, §1."

"329.080. Instructors, registration, qualifications, fees, exemptions

1. Any person teaching any of the classified occupations shall be registered as an instructor. To be registered as an instructor, the person shall have a Missouri operator's license and shall have had at least one year's actual experience as a Missouri operator, and shall pass an examination for an instructor's license to the satisfaction of the state board of cosmetology. The examination fee for an instructor's license shall be five dollars and the renewal fee for the license shall be three dollars annually, in addition to the regular operator's fee."

The word "teaching" seems, at first glance, to be identical in its meaning in both sections, however, we do not feel that the word "teaching" as used in Section 329.080, VAMS, refers to those who teach an apprentice. To the contrary, there is an inference that Section 329.080, VAMS, refers only to those teaching the classified occupations in a school of cosmetology.

Note first that paragraph 3 of Section 329.040, VAMS, reads to the effect that nothing in this chapter shall prohibit "registered operators" from "teaching" the classified occupations in their regular course of business so long as they do not (1) teach regularly more than one apprentice to a registered operator. (2) That the owner or manager thereof does not hold himself out as a school, and (3) the owner or manager does not accept any fee for instruction. Other than these restrictions on the "teaching" of apprentices, this section would by implication seem to exclude all other restrictions within the chapter as

Mrs. Jakaline McBrayer

to registered operators teaching an apprentice within a shop.

Section 329.040, VAMS, is the section providing for the licensing, registration and standards for schools of cosmetology and paragraph 3 of that section is an exception to the school laws. Paragraph 2 of that section provides, in part, as follows:

"2. No such school for hairdressers or cosmetologists within this chapter shall be granted a certificate of registration unless it shall attach to its staff a regularly licensed physician and employ and maintain a sufficient number of competent instructors, registered as such, but not less than one instructor to each twenty students, * * * * (Emphasis ours.)

So it can be seen that the "school must employ and maintain competent instructors registered as such" who may teach up to twenty students at one time. Paragraph 3 in contrast speaks only in terms of "registered operators," who are restricted to the instruction of one apprentice at any one time. There is an inference here that since the apprenticeship provision is an exception to the school law and the school law requires "competent instructors, registered as such," that had the Legislature wished to do so they would have included a provision in paragraph 3 of Section 329.040, VAMS, that if a person were to train an apprentice that they must also be a licensed instructor.

Clearly, these factors indicate that "registered operators" who instruct apprentices are not persons whose vocation it is to teach or to instruct, but to the contrary, there is an indication that any instruction or teaching done by them is only incidental to "their regular course of business." Section 329.050, RSMo, the section relating to qualification of apprentices and students to be an applicant for examination or registration under the cosmetology laws, further strengthens this premise. This section reads, in part:

"1. Applicants for examination or registration under this chapter shall possess the following qualifications:

* * * * *

"(2) They shall have served and completed as an apprentice under the supervision of a registered operator the time and studies required by the board which shall be not less than one year for hairdressers and cosmetologists and not less than

Mrs. Jakaline McBrayer

three months for manicurists; or shall have had the required time in a registered school of at least one thousand hours' training over a period of six consecutive months for the classifications of hairdressers and cosmetologists and at least one hundred fifty hours for manicurists, except that operators having taken manicuring together with hairdressing or cosmetology shall not be required to serve the extra hours otherwise required to include manicuring; and" (Emphasis ours.)

* * * * *

In contrast, Section 329.080, VAMS, indicates that one who becomes an instructor must meet requirements in addition to an operator's license and is a person whose vocation it is to teach the classified occupations subject to the cosmetology laws.

CONCLUSION

Therefore, it is the opinion of this office that a person who trains an apprentice in any of the classified occupations governed by the cosmetology laws of this state, is not subject to the provisions of Section 329.080, VAMS, requiring an instructor's license to teach the classified occupations. To train an apprentice one need only be a registered operator.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry E. Buxton.

Yours very truly,

John M. Dalton
Attorney General

JEB:aw

ELECTIONS: Special Sections 247.130 and 247.180, relating to water district election procedures
WATER DISTRICTS: were not impliedly repealed by Sections 113.490 to 113.870, providing general voting and registration laws for counties over 450,000 as enacted in 1957.

April 15, 1959



Mr. John W. Mitchell
Secretary, Jackson County
Board of Election Commissioners
Courthouse
Independence, Missouri

Dear Mr. Mitchell:

This is in reply to your letter of April 2, 1959, requesting an opinion concerning a question which we have chosen to rephrase as follows:

"Do Sections 113.490 to 113.870, RSMo C.S. 1957, providing for election procedure in counties over 450,000 (Jackson County outside the city limits of Kansas City) supersede or repeal Section 247.130 RSMo providing for water district bond elections and Section 247.180, RSMo providing that water district elections are not to be governed by 'law or laws providing for the registration of voters?'"

Under Section 247.180, RSMo 1949, water district elections are not subject to "law or laws providing for the registration of voters." This provision was enacted in the Laws of 1935, page 323, Section 14. Section 247.130, RSMo providing procedure of the conduct of water district bond elections was likewise enacted in the Laws of 1935, page 327, Section 13. Sections 113.490 to 113.870, RSMo C.S. 1957, were enacted in 1957, to become effective May 1, 1958, for the purpose of superseding the former election procedure for Jackson County and would, on first blush, seem to supersede the special sections relating to water district elections.

Section 113.490(3), RSMo, C.S. 1957, the definition section of the 1957 election enactments, defines election as "any general, special, municipal or primary election, unless otherwise specified."

Mr. John W. Mitchell

Water districts have been defined as municipal corporations by our Supreme Court. See *State ex rel. Halferty v. Kansas City Power and Light Co.*, 346 Mo. 1069, 145 SW2d 116, at page 122, wherein it was said:

"* * * This brings us to consideration of an insistence strongly urged by appellant, viz., that the water district should be regarded as a 'municipal township' within the meaning of these taxing statutes. It, of course, is not a county nor an incorporated city, town or village. It is denominated a 'political corporation' by the act under which it was organized. It might be termed a 'municipal corporation' in the broad sense sometimes attributed to that term. * * *"

Since water districts are nowhere mentioned in Sections 113.490 to 113.870, RSMo, C.S. 1957, it is clear that there is no specific provision in these sections to repeal Sections 247.180 and 247.130, RSMo, relating to water district elections, but if those sections are to be repealed they are only impliedly repealed.

In view of the fact that repeal of Sections 247.180 and 247.130 is not mentioned by Sections 113.490 to 113.870, C.S. 1957, we have examined in detail the legislative history of the new election laws in the attempt to determine legislative intent in the matter.

Sections 113.490 to 113.870, RSMo C.S. 1957, in their present form, were introduced and first read as House Bill No. 497 by Representative Snyder of Jackson County on Thursday, March 14, 1957, page 601 of the House Journal. Its announced purpose was entitled as follows:

"An Act to repeal sections 113.490, 113.590, 113.610, 113.620, 113.660, 113.670, 113.690, 113.712, 113.740, 113.790, 113.800, 113.810, 113.820, and 113.830, RSMo 1955 Supp., relating to registration of voters in counties of 450,000 inhabitants or more, and to enact in lieu thereof twelve new sections relating to the same subject."

Mr. John W. Mitchell

The Missouri Senate changed House Bill No. 497 by amendment on Thursday, May 30, 1957, which amendment had the effect of deleting one paragraph from Section 113.620, RSMo, C.S. 1957, after which the Senate voted to pass House Bill No. 497 in the amended form. At no place in the record of either the House or the Senate is Section 247.180, RSMo, or Section 247.130, RSMo, specifically mentioned.

In enacting laws on a particular subject the Legislature is presumed to act with knowledge of all existing laws on the same subject. This maxim was applied by the St. Louis Court of Appeals in *Sikes v. St. Louis and San Francisco R.R. Co.*, 127 Mo. App. 326, 105 S.W. 700, at l.c. 702, as follows:

"* * * In examining this statute and seeking to arrive at the legislative intention therein manifested, we must do so with the knowledge that the legislature is presumed to know the existing state of the law relating to subjects with which they deal at the time they act on a given question, and therefore are deemed to have dealt with the matter in the light of the state of the law then existing. * * *"

Another familiar rule of statutory construction is that where a general statute is enacted subsequent to an earlier special statute relating to the same subject matter, the special statute will be construed as an exception to the general statute and must be expressly or impliedly repealed. See in this regard the en banc opinion of the Missouri Supreme Court, *State v. Brown*, 334 Mo. 781, 68 S.W. 2d 55, page 59, wherein the rule is stated as follows:

"* * * In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be

Mr. John W. Mitchell

regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tavis et al. v. Foley, 325 Mo. 1050, 30 S.W.(2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S.W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S.W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

In regard to implied repeal of statutes, it is said in 82 C.J.S., Section 288, pages 479 to 486:

"The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication; nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable and a very clear and definite reason therefor can be assigned.

"Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary, irresistible, and free from reasonable doubt."

This reluctance to construe a later statute as repealing a prior statute impliedly inconsistent, which later statute does not by its language act to specifically repeal the prior statute, is a maxim universally followed by the courts. A leading case setting forth this proposition as applied by the

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Missouri courts is State ex rel. Boyd v. Rutledge, an en Banc opinion by the Missouri Supreme Court, February 11, 1929, 321 Mo. 1090, 13 S.W. 2d 1061, at page 1065, wherein the court states:

"* * * Repeals by implication are not favored - in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the later may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand. * * *"

CONCLUSION

Therefore, it is the conclusion of this office that Section 247.180, RSMo, providing that water districts are to have their own exclusive election procedure and Section 247.130, providing for bond elections were not repealed by, sufficiently inconsistent with, or irreconcilable with Sections 113.490 to 113.870, RSMo C.S. 1957, relating to election procedure in counties over 450,000, to be repealed by the latter sections.

Yours very truly,

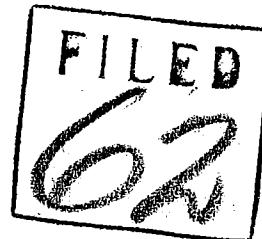
John M. Dalton
Attorney General

JBB:lc

SCHOOL DISTRICTS:
SCHOOL REORGANIZATION:

The mere encirclement of one district by territory comprising a proposed reorganized school district would not of itself be improper, provided that there has otherwise been complete compliance with the laws of Missouri applicable to the reorganization of school districts.

September 16, 1959



Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Palmyra, Missouri

Dear Mr. Mitchell:

This is in response to your letter of July 27, 1959, which we quote in part as follows:

"The Monroe City School District is presenting a reorganization of schools plan, with the approval of the State Board of Education. As I understand the facts, the plan is to submit to the voters the question of reorganization with several rural districts to be included in the Monroe City District by the reorganization plan. The reorganization plan leaves one district out of the reorganized territory, and this district is completely surrounded by districts in the reorganized territory. The one district not included in the reorganized territory will be bounded on all sides by the reorganized territory, if the plan is carried out. The question is whether or not the Monroe City District may reorganize, leaving the one district out of the reorganization plan under the circumstances mentioned."

Upon a careful study of the applicable laws of Missouri, it is the opinion of this office that the mere encirclement of one district by territory comprising a proposed reorganized school district would not of itself be improper, provided that there has otherwise been complete compliance with

Honorable Harry J. Mitchell

the laws of Missouri applicable to the reorganization of school districts.

CONCLUSION

It is the opinion of this office that the mere encirclement of one district by territory comprising a proposed reorganized school district would not of itself be improper, provided that there has otherwise been complete compliance with the laws of Missouri applicable to the reorganization of school districts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:me

COUNTY SUPERINTENDENTS:
JUVENILE OFFICERS:

There is no conflict between the duties of the county superintendent of schools and the juvenile officer in connection with the compulsory school attendance of children.



January 22, 1959

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"There appears to be a conflict in the Statutes as to the duties of the County Superintendent of Schools and the Juvenile Officer under the new Juvenile Code in connection with the compulsory school attendance of children and this office would like to have an opinion defining the duties of the County Superintendent of Schools and the Juvenile Officer in connection with Sections 164.034, 211.031, 211.401 R.S.MO.

"It appears that the County Superintendent of Schools is the attendance officer, that the Juvenile Court is charged with exclusive original jurisdiction in proceedings pertaining to education required by law, and the Juvenile Officer is charged with making investigations, reports, arrests, and performing other duties pertaining in his office, which apparently would also be the duties of the attendance officer."

Numbered paragraph 1 of Section 164.040, RSMo 1949, to which you refer, reads:

"1. The county superintendent of schools in each county shall act as school attendance officer for the county without

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additional compensation for such services. The county superintendent of schools shall have the power of a deputy sheriff in the performance of the duties of school attendance officer in all school districts of the county except as herein provided; provided, that the board of education in school districts organized under the provisions of sections 165.263 to 165.653, RSMo 1949, may appoint and remove at pleasure one or more school attendance officers and shall pay them from the public school funds; and provided further, that, if any board of education in any school district organized under the provisions of sections 165.263 to 165.653, RSMo 1949, does not appoint a school attendance officer, the county superintendent of schools shall act in such district."

A portion of numbered paragraph 2 of this section reads:

"* * * shall have the power to arrest, without warrant, any truant, or non-attendants or other juvenile disorderly persons, and place them in some school, or take them to their homes, or take them to any place of detention provided for neglected children in such county or school district; shall serve in the cases which they prosecute without further fee or compensation than that paid by the board as aforesaid, and shall carry into effect such other regulations as may lawfully be required by the board appointing them."

It will be noted that the above gives the county superintendent of schools the power of a deputy sheriff in the performance of the duties of school attendance officer; that he has the power of arrest without warrant of any truant or non-attendants at schools, or "other juvenile disorderly persons," and to place them in some school or take them to their homes or to any place of detention, provided for neglected children in such county or school district.

In 1957 the Missouri Legislature enacted Chapter 211, RSMo Cum. Supp. 1957, entitled "Neglected and Delinquent

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Children in Juvenile Courts." Section 211.021, Cum. Supp. 1957, of that chapter, reads:

"Definitions.--As used in this chapter, unless the context clearly requires otherwise:

"(1) 'Adult', means a person seventeen years of age or older;

"(2) 'Child', means a person under seventeen years of age;

"(3) 'Juvenile court', means the Cape Girardeau court of common pleas and the circuit court of each county, except that in the judicial circuits having more than one judge, the term means the juvenile division of the circuit court of the county;

"(4) 'Legal custody', means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, treatment and discipline of a child. Legal custody may be taken from a parent only by court action and if the legal custody is taken from a parent without termination of parental rights, the parent's duty to provide support continues even though the person having legal custody may provide the necessities of daily living;

"(5) 'Parent' means either a natural parent or a parent by adoption and if the child is illegitimate, 'parent' means the mother."

It will be noted that under the definition in numbered paragraph 4 above of "legal custody" there is contained the provision to provide education to the neglected child.

Section 211.031, RSMo Cum. Supp. 1957, reads, in part:

"Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

Honorable Charles E. Murrell, Jr.

"(1) Involving any child who may be within the county who is alleged to be in need of care and treatment because:

(a) The parents or other persons legally responsible for the care and support of the child neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child shall not be construed as neglect when the treatment is recognized or permitted under the laws of this state; or * * *."

From the above it will be seen that the juvenile court has jurisdiction where it is alleged that a child is in need of care and treatment because the person having legal custody of such child neglects or refuses to provide education which is required by law.

Section 211.401, RSMo Cum. Supp. 1957, which sets forth the duties of juvenile officers, reads:

"1. The juvenile officer shall, under direction of the juvenile court:

"(1) Make such investigations and furnish the court with such information and assistance as the judge may require;

"(2) Keep a written record of such investigations and submit reports thereon to the judge;

"(3) Take charge of children before and after the hearing as may be directed by the court;

"(4) Perform such other duties and exercise such powers as the judge of the juvenile court may direct.

"2. The juvenile officer is vested with all the power and authority of sheriffs to make arrests and perform other duties incident to his office.

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"3. The juvenile officers or other persons acting as such in the several counties of the state shall cooperate with each other in carrying out the purposes and provisions of this chapter."

We believe that the above is a full statement of the situation with regard to the duties of the county superintendent of schools and the juvenile officer with respect to the matters about which you inquire. We do not believe that there is any conflict between these duties.

It is not the function of a juvenile officer to police all of the children in the territory which he serves and to see that they attend school. Broadly speaking, the function of a juvenile officer is to assist the juvenile judge in dealing with those children who are brought before the juvenile court by virtue of their having been arrested for the commission of some offense or because some person has informed the court that they appear to be in need of care and treatment for reasons stated in Section 211.031, RSMo Cum. Supp. 1957, or otherwise are within the purview of the provisions of that section. Until a child is arrested for the commission of an offense or information such as is mentioned in the next preceding sentence is given to the court, the juvenile officer has no functions to perform with respect to such child.

On the other hand, the basic function of a school attendance officer is to see that all children who are required to be in school do attend school. Among other things, a school attendance officer is given the duty to serve notices upon, and file complaints against, parents of children who are required to be in school but fail to attend school; and he is given the power to arrest truants or nonattendants or other juvenile disorderly persons and place them in school or take them to their homes or take them to places of detention provided for neglected children. This provision concerning arrest by a school attendance officer does not conflict with the provision in the juvenile code with respect to children being turned over to a juvenile officer upon arrest because the latter provision relates only to arrests for the commission of offenses and the arrests made by a school attendance officer in the normal performance of his duties will not be of that nature. The law does not place any duty upon a school attendance officer to institute any court proceedings directed at a child (as distinguished from his parents), although, like any other person, he could, if he saw fit, inform the juvenile court that it appeared to him that the child came within the purview of the juvenile code.

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With respect to that small percentage of children who have been brought before the juvenile court, there may be some duplication and overlapping in the powers and duties of the school attendance officers and juvenile officers but that does not mean that there would be any conflict in their powers and duties. It is a very common situation for different law enforcement officers to have the same powers and duties in given situations.

We believe that, in those few instances in which both the juvenile officer and the county superintendent have authority to deal with the same children, both have the power to act, and that the problem is one to be solved by cooperation.

CONCLUSION

It is the opinion of this department that there is no conflict between the duties of the county superintendent of schools and the juvenile officer in connection with the compulsory school attendance of children.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh F. Williamson.

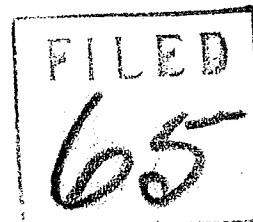
Very truly yours,

JOHN M. DALTON
Attorney General

HPH:mc

ROADS & HIGHWAYS: Bridge built by county on public road remains
COUNTIES: property of county, and may be moved to a new
COUNTY COURT: location, when road on which bridge is located
BRIDGES: has been abandoned.

February 19, 1959



Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Mr. Murrell:

This refers to your letter requesting an opinion of this office, which letter reads as follows:

"I would like an opinion from your office for the benefit of the County Court of Knox County as to whether or not the county owns and can remove bridges under the following state of facts.

"We have in Knox County several roads that have not had public money spent on them for more than five years. Many of the roads have grown up in brush and trees and are impassable and, in some instances, the roads or roadways are not used, but farmers use their fields for travel until they reach a creek or gully where a bridge is located on the old roadway, they then come back upon the old road right-of-way, cross the bridge and go back in their fields again. In most cases the use amounts to private use of the bridge by one or two farmers, and in some cases the bridges cannot be used since the flooring is gone and only the steel framework remains. In many of the cases the bridges are built of steel and iron and could be removed and used on other roads now in use which need bridges badly at this time. Although the roads have not been used for more than five years by the public and public money has not been spent on the roadway by the County for more than five years, an order of court has not been made to the effect that the road is abandoned.

"We would like to know if the County still own the bridges and can remove them, or does the bridge

Honorable Charles E. Murrell, Jr.

belong to the landowners adjoining the roadway if the road is considered abandoned.

"If possible, we would like to remove the bridges and use them where they can be of service and are needed by the public."

As indicated by your letter, Section 228.190, RSMo Cum. Supp. 1957, provides that "nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same." The question whether there has been such nonuser as to result in the abandonment and vacation of a road depends, of course, upon the facts of the particular case. For the purposes of this opinion, we shall assume that there has been, in fact, an abandonment and vacation of the roads pursuant to this statutory provision; and we shall deal only with the question concerning the effect of such abandonment upon the ownership of bridges located upon such roads.

While it is not expressly stated in your letter, we shall assume that the bridges in question were built by the county, so that, prior to the abandonment of the roads, the bridges were owned by the county or by the county as trustee for the public. We shall further assume that, in the event the rights-of-way for the roads were originally provided by deeds, such deeds contained no specific reference to the ownership of bridges upon the abandonment of such roads.

We are enclosing herewith copies of two prior opinions of this office which have a bearing upon the question presented by you. The first opinion, dated October 16, 1949, and furnished to John M. Cave, dealt with the question whether a bridge which had been built by a county in an area which was later included in a special road district could be moved by the county to a new location after the abandonment of the road upon which the bridge was located. In that opinion, this office concluded as follows:

"In the premises we are of the opinion that the title to a bridge erected out of county funds remains in the county court even though such bridge be located within the boundaries of a subsequently incorporated special road district; and that upon vacation of the county road, of which such bridge forms a part, the county court may dispose of such bridge in the same manner as any other county property. In other words, it may be disassembled and reassembled in a location which will serve the interests of the public in carrying traffic across streams or it may be disposed of for cash."

Honorable Charles E. Murrell, Jr.

The second opinion, dated May 28, 1954, and furnished to Mr. W. C. Whitlow, involved a situation in which a special road district had constructed a bridge and the question presented was whether the county or the road district owned the bridge upon the abandonment of the road upon which it was located. In that opinion, this office concluded as follows:

"In the premises we are of the opinion that the 'title' to a bridge constructed out of district funds by a special road district upon a public road located within such district is not affected by the abandonment of such public road. It is our further opinion that the board of commissioners of such special road district may thereafter dispose of such bridge or may dismantle and re-erect the same at some other place within such special road district where public convenience and necessity may require."

"The foregoing conclusion is based upon the assumption that such bridge was paid for out of funds belonging to the special road district."

It will be noted that these opinions are to the effect that, after the abandonment of a road, a bridge located upon such road remains the property of, and may be moved by, the county or road district which constructed the bridge. However, neither opinion considered directly the question whether the owner of the land adjoining the road, rather than the political subdivision which constructed the bridge, was the owner of the bridge.

In Special Road District No. 4 of Hollinger County vs. Stepp, Mo. App., 4 S.W. 2d 480, a landowner contended that a bridge could not be moved after the abandonment of a road upon which the bridge was located. In that instance, the road at the site of the bridge had been taken by a drainage district for drainage purposes and the bridge and road had been rendered useless for public travel. The road had been relocated and the road district had undertaken to move the bridge to the new road, but it had been prevented from doing so by the owner of the adjoining land. The road district had thereupon sought to enjoin the landowner from interfering with its efforts to move the bridge. In affirming the action of the trial court in granting such injunction, the Springfield Court of Appeals stated, in part, as follows:

"[4] Defendant at the trial contended that he had relinquished the right of way at and approaching the bridge, with a reservation that, when the right of way was no longer used for a road, it would revert to him. He claims to have executed and delivered to the county court a right of way

Honorable Charles E. Murrell, Jr.

deed containing such reservation, but no such deed was produced, and a diligent search failed to find such deed. Defendant, however, introduced evidence tending to show that he did execute and deliver such deed, but he says himself that there was no provision in the deed whereby the bridge should be his property if the road on which it was installed was abandoned as a public road. Clearly defendant cannot justify his taking charge of the bridge on the theory that his right of way deed so provided.

"[5] It is next contended that plaintiff had no right to remove the bridge from a legally established road and install it on a road that had not been legally established, and that, as a resident taxpayer of plaintiff district, he (defendant) had the right to protect the bridge from such diversion in the interest of himself and of the public. It is contended that the proceedings in the county court to abandon the old road and establish the new one were void for failure to comply with the statute regulating such matters. Sections 10625 et seq., R.S. 1919. The record shows that the old road at and approaching the bridge was destroyed by the drainage district. If it was destroyed, it was, of course, no road at all, and, even though the proceedings in the county court were void, which we do not determine, such could not leave the old road in existence, and therefore defendant had nothing to protect and preserve.

"We do not think it is necessary to pursue the questions further. Defendant was clearly in the wrong, and plaintiff, under the law, was clearly entitled to the remedy it sought. The judgment should be affirmed, and it is so ordered."

In the case of Board of Nevada School District, Mo. Sup. 251 S.W. 2d 20, the Missouri Supreme Court considered a somewhat similar problem involving the ownership and right of removal of a school building upon the abandonment of a schoolhouse site and, in holding that the school district had the right to remove the school building, the court stated:

"[10] The evidence tended to show, as the court found and as appellants admit, that the premises were conveyed to School District No. 119 'for a

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schoolhouse site' and that 'in pursuance thereof a schoolhouse and other buildings and necessary improvements were built thereon.' The court found that there were no improvements on the acre of land when the deed was executed, but that shortly thereafter the schoolhouse was built. In view of the evidence we draw the inference that the improvements were made by School District No. 119 at its own expense and with public funds, at least, appellants offered no evidence tending to show that there were any improvements on the property when it was conveyed to School District No. 119 or that any of the improvements were made by the grantors or their heirs. We further imply from the terms of the grant that the construction of a school building and improvements at the expense of the School District was contemplated by the parties when the deed was executed and delivered. It was further contemplated by the parties that there was a possibility the property might not always be used for the purpose for which it was being conveyed. Accordingly, the deed further provided, 'whenever it is abandoned by the directors and ceases to be used for that purpose the title shall immediately revert to the grantors herein.' In such situation we hold that the improvements placed upon the property remained the personal property of School District No. 119 and that said district or its successors in interest would continue to own the school building and improvements, and only the land in its unimproved condition would revert to the grantors or their heirs in the event that the estate granted expired by reason of the limitations stated in the Board deed. In this connection it should be said that appellants who brought the ejectment suit and sought to recover possession of both the real estate and the improvements, offered no evidence tending to show that the improvements could not be removed from the premises without injury to the freehold estate.

"Under the facts shown in this record, we think the applicable rule of law as to ownership and right of removal of improvements is well stated in *Hatton v. Kansas City, C. & S.R. Co.*, supra, 253 Mo. 660, 162 S.W. 227, 232, 234, when the court quoted with approval from another case, as follows: 'The fact that the estate conveyed

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by the grantor to the grantee reverted to the former, upon the abandonment of the railroad and that the grantor entered upon the possession of the land, did not in our opinion prevent the vendee of the grantee from removing the structure erected by the former, in accordance with the terms of the grant. The erection was entirely consistent with the grant and with the uses and purposes for which it was made. It did not, therefore, become a part of the realty, but was a part of the estate granted, and, upon the reversion thereof, remained the property of the grantee. The right to sell the same was no greater than the right of removal, and, when sold, the vendee had the same right to remove as had his vendor." And see 27 Am. Jur. 261, Improvements, Sec. 4; May v. Board of Education, 12 Ohio App. 456.

"The trial court did not err in declaring the law to be that if and when respondent ceases to use the described premises for a schoolhouse site or for school purposes, and abandons the same, the respondent shall have the right, and at present has the right, to cause the buildings and improvements to be removed from the land."

In the Hatton case, mentioned in the above quotation, the Supreme Court held that, where a railroad company had abandoned a portion of its right-of-way, the railroad company still owned, and had the right to remove, the rails, ties and similar property located on such abandoned right-of-way. In its opinion in that case, the court stated as follows:

"[9] We think that there is but one view that, where the railroad is a trespasser and in most cases and for most purposes, rails, ties, bridges, and other paraphernalia formerly personal property, when affixed to the soil, become real estate. But that is not the case when a dispute arises between the railroad company, or its assignees, and the owner of the servient estate, in those cases where the dominant estate has arisen from consent, express or implied. Where a house, a depot, or other structure is erected by the railroad upon the land of another pursuant to an act of trespass, or without any permission

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then the structure becomes a fixture and may not be removed. Hunt v. Railroad, 76 Mo. 115. This is but a stating as a truism, the converse of the general rule as to fixtures, which is: That structures erected upon the land of another with the consent of such owner continue to be personal property. * * *

"[10] If there be a question as to such consent, or a question as to an agreement that it shall become a fixture, the tests have been said to be: (1) Real or constructive annexation of the property in question to the soil; (2) Adaptation of the property in question to the ordinary use or purposes of the land to which the alleged fixture is annexed; and (3) the intention of the party making the annexation to make the property in question a permanent accession to the freehold. Scobell v. Block, 82 Hun. 223, 31 N.Y. Supp. 975; Taylor v. Collins, 51 Wis. 123, 8 N.W. 22; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368. And of these three unities the question of intention is said to be controlling. Press Brick Co. v. Brick & Quarry Co., 151 Mo. 501, 52 S.W. 401, 74 Am. St. Rep. 557. And this presumption of intention has been held to be the governing test in a case such as the instant one as to rails of a railroad erected with permission of the owners of the freehold. The rule is stated by Elliott thus: 'The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad and hence are not to be regarded as fixtures forming part of the real estate.' 2 Elliott on Railroads, 998, citing Northern Central Ry. Co. v. Canton Co., 30 Md. 347; Wagner v. Cleveland, etc. Ry., 22 Ohio St. 563, 10 Am. Rep. 770; Hays v. Texas, etc., Ry. Co., 62 Tex. 397."

In our review of the Missouri statutes, we find no provision that the abandonment and vacation of a public road pursuant to Section 228.190, RSMo Cum. Supp. 1957, shall effect any change in the ownership of bridges located upon such road; and, in the light of the above mentioned authorities, it is our opinion that a bridge constructed by

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a county remains the property of, and can be removed by, the county notwithstanding such abandonment and vacation of the road upon which the bridge is located.

CONCLUSION

It is the opinion of this office that where a public road is deemed to be abandoned and vacated, pursuant to Section 228.190, RSMo Cum. Supp. 1957, because of nonuser by the public, a bridge which had been constructed upon such road by a county remains the property of the county and may be moved by it to another location.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

Yours very truly,

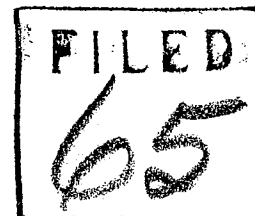
JOHN M. DALTON
Attorney General

JCB:EW

Encs (2)

SCHOOLS: County board of education may revise re-
organization plan and submit such revised
SCHOOL DISTRICTS: plan to the voters after proposed plan
has been twice disapproved by the State
Board of Education.

July 17, 1959



Honorable William C. Myers, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Myers:

This is in response to your request for opinion dated May 8, 1959, which reads as follows:

"The county board of education has requested that this office obtain the opinion of your office on whether or not the county board of education has the authority to revise the proposed plan of reorganization after it has been rejected the second time by the state board of education."

Your question involves a construction of Section 165.677, RSMo, Cum. Supp. 1957, which reads as follows:

"Upon receipt of such reorganization plan, the state board of education shall examine such plan. The state board shall approve or disapprove such plan either in whole or in part. If the plan includes any proposed district with territory in more than one county, the board shall designate the county containing the greater portion of such proposed district based upon assessed valuation as the county to which such district shall belong. The secretary of the county board shall be notified of the state board's action within sixty days following receipt of the plan by the state board. If the state board finds that the

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reorganization plan is inadequate in whole or in part, it shall return the plan to the secretary of the county with a full statement indicating the parts thereof it has approved and its reasons for finding the plan or any part inadequate. The county board shall have sixty days to review the rejected plan or parts thereof, make alterations, amendments and revisions as may be deemed advisable and return the revised plan or part to the state board for its action. If the revised plan or part is disapproved by the state board, the county board shall propose and submit its own plan or part to the voters within sixty days following receipt of disapproval of the revised plan or part. No enlarged district may be proposed or submitted without the approval of the state board unless such proposed district shall have a minimum of two hundred pupils in average daily attendance for the preceding year or is comprised of at least one hundred square miles of area. Such plan or part shall be submitted to the qualified voters in the same manner as if the plan or part had been approved by the state board. Nothing in sections 165.657 to 165.707 shall be construed as preventing the establishment and operation of more than one school in any enlarged district."

Under the general scheme of reorganization of school districts the primary responsibility rests with the county board of education. The county board prepares the reorganization plans and the State Board either approves or disapproves with suggestions. There is no requirement that the county board follow the recommendations of the State Board, even in the submission of the revised plan. The apparent purpose in requiring submission of the reorganization plans to the State Board is not to vest the State Board with veto power but to give the county boards the benefit of the experience and recommendations of the State Board.

The above section states that after the plan of the county board has been disapproved in whole or in part and the revised

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plan also disapproved, the county board shall submit its own plan or part to the voters within sixty days following receipt of disapproval of the revised plan or part. There is no provision for a subsequent submission of that plan with revisions to the State Board. Conceivably, in disapproving the revised plan, the State Board might make suggestions for the improvement of the plan which would be both beneficial and acceptable to the county board.

It is proper, and often necessary, to consider the effect and consequence of a proposed interpretation of a law to ascertain what is probably its true intent. *Bowers v. Smith*, 111 Mo. 44, 45.

If it were held that the county board is powerless to revise its plan after rejection the second time by the State Board, part of the salutary effect of the statute would be lost because the county board would then be required to submit to the voters a plan which both it and the State Board considered undesirable.

If the purpose of that statute is as we have construed it, i.e., to give to the county boards of education the benefit of the suggestions and criticism of the State Board, its purpose can more fully be realized by saying that the county board does have the authority to revise its proposed plan of reorganization after it has been disapproved the second time by the State Board of Education and may submit such revised plan to the voters.

The only limitation placed upon the submission to the voters of the county board's own plan of reorganization, which plan has not been approved by the State Board, is that any proposed district must have a minimum of 200 pupils in average daily attendance for the preceding year or be comprised of 100 square miles of area.

CONCLUSION

It is the opinion of this office that a county board of education may revise its proposed plan of reorganization and submit its own plan to the voters after such plan has been disapproved twice by the State Board of Education.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

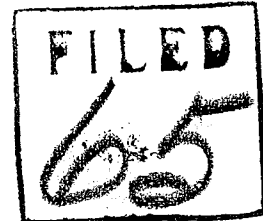
JOHN M. DALTON
Attorney General

JWI:mc;ml

SHERIFF'S LIABILITY FOR
MONEY OR PROPERTY:

The Sheriff of Jasper County is liable for any moneys stolen from him which came into his hands in the course of his discharge of the duties of his office whether such funds were public or private.

September 9, 1959



Honorable William C. Myers, Jr.
Prosecuting Attorney, Jasper Co.
Miners Bank Building
Joplin, Missouri

Dear Sir:

On August 14, 1959, you wrote to this office for an official opinion as follows:

"This office requests an opinion from your office as to the standard of care to which the Sheriff is to be held for money which is taken from his custody.

"Is the Sheriff to be an insurer of monies collected by him or is he accountable only for his negligent acts in keeping said money? Is the Sheriff's duty any different with respect to monies which he collects as fines, penalties, and forfeitures pursuant to an order, judgment or decree of a court of record or those monies collected by him through other civil processes. If the Sheriff is not an insurer of funds he has collected and there is no negligence on his part in the disappearance of said funds, then who is liable to persons who have a claim on the funds collected by the Sheriff?

"Section 57.130, Missouri Revised Statutes 1949 provides in part that the Sheriff 'shall collect and account for all fines, penalties, forfeitures, etc.' and Section 57.140 provides that 'all monies collected by the Sheriff shall be paid to the Plaintiff, etc.' Section 57.370 makes it the duty of the Sheriff to collect fees in criminal matters and pay them over to the County Treasurer.

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"I can find no section which states the degree of care to which the Sheriff is to be held if he cannot account for monies which he has collected."

On the same date you wrote further in this regard as follows:

"The occasion which gave rise to our requesting an opinion on the above occurred on or about the 5th day of August, 1959.

"On this particular date the Sheriff's office in the Courthouse Building in Joplin, Missouri, was broken into and a safe burglarized; there was approximately \$414.00 in cash taken from the Sheriff's safe. This money was money which the Sheriff had collected through ordinary civil process and pursuant to orders and judgments of the Court."

In this situation it is obvious that there is no question involved regarding malfeasance or misappropriation of funds by the sheriff. The issues which are present relate, as you state in your letter, to the questions of the degree of care which is required of a sheriff when he has money and/or property in his possession which come to him in his official capacity, and the further question as to whether the sheriff is the insurer of such funds and, as suggested by you, whether the liability of the sheriff is any different with regard to moneys which come into his hands from different sources for different purposes.

We believe that there is a distinction to be made between the kinds of money and property which come into a sheriff's hands, and that this distinction is to be made upon the basis of "public funds" and "private funds." We believe that this distinction is to be made because all funds which come into a sheriff's hands are not "public", as will be made plain subsequently, and hence it would seem that all funds which are not "public" must necessarily be "private."

However, we shall not make any attempt to define "public" and "private" funds because we believe that the liability of the sheriff is the same for both.

Honorable William C. Myers, Jr.

With regard to "public funds" we direct attention to an opinion, a copy of which is enclosed, rendered by this department on January 30, 1951 to John C. Kibbe, Prosecuting Attorney of Moniteau County, which opinion holds that a custodian of public funds is liable as an insurer for any loss thereof. You will note in this opinion two cases are cited, the second of which was decided by the Kansas City Court of Appeals in 1957. This was the case of *Fayette v. Silvey*, 290 SW 1019, in which the Kansas City Court of Appeals held that a public officer was an insurer of public funds lawfully in his possession.

In regard to the liability of the sheriff in the case of "private" funds, we direct attention to the case of *State v. Gatzweiler* 49 Mo. 17. In this case there was an action on the official bond of the defendant as sheriff of St. Charles County. The petition averred that an execution was placed in the hands of the sheriff for the sum of \$15,000 with interests and costs, and that because of circumstances which we need not here set forth, the defendant sheriff would not pay over the entire sum which he realized from the execution sale because he was restrained and prevented from doing so by agencies which it was beyond his power to control. Nonetheless, the Missouri Supreme Court held that the sheriff was liable for this sum. The Court in this regard stated (1.c. 26):

"The defendant's bond was conditioned to discharge the duties of the office of sheriff according to law. It is well established that a public officer who is required to give bond for the performance of his duties, and the proper payment of moneys that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise or ordinary care and diligence. His liability is fixed by his bond, and no parting with the money, or loss either by theft, robbery or otherwise, will release him from his obligation to make payment. (*United States v. Prescott*, 3 How. 578; *Muzzy v. Shattuck*, 1 Denio, 233; *Hancock v. Hazard*, 12 Cush. 112; *Commonwealth v. Comly*, 3 Penn. St. 372; *State v. Harper*, 6 Ohio St. 607; *Halbert v. The State*, 22 Ind. 125.) The duty of the sheriff is to pay over money coming into his hands to those legally entitled thereto, and his bond is the contract that he will not fail upon any account to do this act."

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CONCLUSION

It is the opinion of this department that the Sheriff of Jasper County is liable for any moneys stolen from him which came into his hands in the course of his discharge of the duties of his office whether such funds were public or private.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/mlw
Enclosure

**TRANSFER OF REGISTRATION OF
VOTERS AND COST THEREOF:**

In a situation where there is re-establishment of voting wards in the city of Carthage, the necessary adjustment as to the ward and precinct location of registered voters should be made by a transfer of registration by the county clerk of Jasper County.

The cost of such transfer should properly be borne by Jasper County.

December 8, 1959

Honorable William C. Myers, Jr.
Prosecuting Attorney
Jasper County
Carthage, Missouri



Dear Mr. Myers:

Your recent request for an official opinion reads:

"Mr. J. C. Baird, County Clerk of Jasper County has requested that I obtain the opinion of your office on the following matter:

"The City Council of the City of Carthage will on the 26th day of October, 1959, pass an ordinance re-establishing the wards of the City of Carthage and creating two precincts in each ward. This will vitally effect registration of voters as the registration books now exist in my office.

"I am now faced with the question whether or not a reregistration by the citizens of the City of Carthage will be necessary or whether a transfer of registration should be made in my office only.

"In either manner of handling this matter there will be costs not budgeted. My second question is, should this cost be borne by the City of Carthage or Jasper County?"

We note that Chapter 116, RSMo, Cum. Supp. 1957, is applicable to cities of ten thousand or more, and that Jasper County does not have registration of voters.

I note that your first question is whether it will be necessary to have a reregistration of the voters of Carthage or whether your office should make a transfer of registration.

Honorable William C. Myers, Jr.

Chapter 116, supra, makes no specific statement on this matter. Inferentially, however, the chapter does, it seems to us, indicate that in the situation which you present reregistration is not called for. Section 116.010, RSMo, Cum. Supp. 1957, states in part (par. 1):

"* * * After so registering (the first and original registration provided for), * * * a qualified elector * * * shall not be again required to register, unless obliged to do so by the terms of this chapter. * * *"
(Words in parenthesis ours)

Section 116.080, RSMo, Cum. Supp. 1957, pertains to reregistration. This section reads:

"On or near the first day of each calendar month succeeding the general permanent registration herein provided for, the prosecuting attorney of the county shall furnish to the county clerk, in writing, over his signature, the names of all persons disqualified as voters coming to his knowledge during the month by reason of a conviction for crime, and the prosecuting attorney shall be affirmatively charged with knowledge of convictions in his own county; the registrar of vital statistics shall furnish the county clerk, in writing, a list of all persons dying during the month; the clerk of the probate court shall furnish the county clerk, in writing, a list of all persons during the month declared incapable of managing his property and for whom a guardian of his person and estate is accordingly appointed; the presiding judge of the county court shall furnish the county clerk with a list, in writing of all persons during the month committed to a state insane asylum as an insane person or committed to the poor farm as a pauper. The county clerk shall accept the reports of the above public officers as true for purposes of canceling registrations. It shall be the duty of the county clerk to check the registration book for absent voters. When said registration shows that any registered voter has not voted for the last two general elections, or the primaries preceding same, the county clerk shall notify the voter by mail of such fact and that unless within thirty days he send to the county clerk a signed application for reinstatement of his registration or personally apply for such reinstatement his registration will be canceled. Such application for reinstatement shall be in writing, signed by the voter and stating his address and the fact that he is a qualified voter. If the county clerk, upon comparison of such signature

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with the signature upon the proper affidavit of registration, shall be satisfied that both were written by the same person, the registration shall be reinstated. If the voter cannot sign his name, he shall be required to appear in person before the county clerk to be identified in the prescribed manner; otherwise, said voter shall not be entitled to vote until he or she shall have again registered as herein provided for new registrations."

Section 116.010, RSMo, Cum. Supp. 1957, as amended, numbered paragraph 2, also pertains to reregistration, but has no bearing here since it simply provides that any voter, in a city of not less than 30,000 and not more than 50,000 inhabitants in a county not having county wide registration, who was registered prior to July 1, 1955, shall be required to reregister under the provisions of Chapter 116, and that no registration in such city made before July 1, 1955, is valid after July 1, 1958.

Section 116.070, RSMo 1949, also pertains to reregistration, but only to people who change their surname, or who change their address within the city, none of which pertains to the present situation.

It will be noted that no where in the above sections is any provision made for a mass reregistration under the circumstances which are present in the situation which you set forth. We again revert to the quotation from Section 116.010 which states that a voter shall not be required to reregister unless obliged to do so by the terms of this chapter.

In Section 116.060, RSMo, Cum. Supp. 1957, we note, with reference to the records of registration which the law provides the county clerk shall keep, that "all three records shall be continuously revised and kept up to date. The county clerk, on the day before any election for which registration is made, shall deliver, or cause to be delivered, to the judges of election . . . proper registration records for their respective precincts . . ." We also note the following in Section 116.030:

"* * * If on election day it shall come to the attention of the county clerk that through an inadvertance, a registration card has been placed in the wrong precinct binder, the county clerk shall correct such error on the blue registration record and shall send such record to the proper voting precinct."

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The above, it would appear, gives the county clerk the authority, and indeed lays upon him the obligation, to keep his records in such a condition that the proper registered voter is shown as being registered in the proper precinct. If the county clerk is authorized to do this on what would be a comparatively small scale, we believe that he would be also authorized to do it in such a situation as you present. Inasmuch as the county clerk has the address of all registered voters in the city of Carthage and will have the boundaries of the new precincts when they are established, it would appear to be entirely possible for him to make such an adjustment, and that it would be entirely feasible for him to do so. And furthermore, as we noted above, we find nothing in Chapter 116, or elsewhere, which would authorize the call for a completely new mass registration of all voters.

Your second question is whether the cost involved, either in a reregistration or in a transfer in your office, should be borne by the city of Carthage or Jasper County.

In this connection we direct your attention to Section 116.030, RSMo, Cum. Supp. 1957, which reads:

"Any qualified elector who registers as herein provided shall be entitled to vote in the election precinct where his or her name is registered and in which he or she is registered as a resident. Any such person shall register for the purpose of the first general registration herein referred to under the supervision of the county clerk of the county in which any such city may be located. The county clerk of such county shall be in charge of such general registration and all other registrations provided for by this chapter. (The said county clerk and his deputies shall have the power to administer oaths and perform all other duties necessary to carry out the provisions of this chapter. The county clerk may appoint not more than two additional deputies who shall be in addition to those regularly employed in his office, to perform such necessary duties and other duties as may be assigned to them by the county clerk, and whose salaries shall be fixed by the county court. Before they shall enter upon their duties, the county clerk shall submit the names of the one or more deputies to the judges of the circuit court sitting in any such county, who shall approve the appointment of any such deputies before they shall enter upon the performance of their duties. During the first general registration referred to, and during any rush periods which may occur, the county clerk of any such county shall be empowered to employ any such extra deputies as may be necessary, and their compensation shall be fixed by the county court. The county clerk's office shall be open

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for permanent registration at all times that such office is open for other business, Sundays and holidays excepted. No person shall be entitled to register within a period of twenty-eight days prior to any election in which the registration records provided for in this chapter are to be used. The county clerk shall not cancel or reinstate any registration within five days prior to any such election, except at the direction or order of the circuit court. If on election day it shall come to the attention of the county clerk that through an inadvertance, a registration card has been placed in the wrong precinct binder, the county clerk shall correct such error on the blue registration record and shall send such record to the proper voting precinct."

From the above it will be noted that the entire responsibility for the original and for all subsequent registrations in such cities as are here under consideration is placed upon the county clerk. No where in Chapter 116, or elsewhere, is there any indication that such responsibility is divided. In this regard we note particularly the statement in the above section that "The county clerk of such county shall be in charge of such general registration and all other registrations provided for by this chapter." (Emphasis supplied.) This section, and subsequent sections in this chapter, proceed to make provisions for subsequent registrations following the general registration.

The chapter contemplates that this work will place an extra burden upon the county clerk, and makes provision for it by giving the county clerk authority to appoint not more than two additional deputies, in addition to those regularly employed in his office, to assist in handling this additional work, "whose salaries shall be fixed by the county court."

The section also provides that during the first general registration, and during any "rush periods" which may occur subsequently, the county clerk may employ "such extra deputies as may be necessary, and their compensation shall be fixed by the county court."

These extra deputies would all be county employees, and, of course, as such would be paid by the county and not by the city. As we stated above, it seems clear that the entire responsibility for such registration is laid upon the county and that the county is to take care of all of the work which is entailed and to pay for such work out of county funds. This is our answer to what you term your second question.

Honorable William C. Myers, Jr.

In your opinion request you state that "in either manner of handling this matter there will be costs not budgeted." You have since writing the above asked us not to consider this phase of the matter, and we shall, accordingly, not consider it.

CONCLUSION

It is the opinion of this department that in a situation where there is a re-establishment of voting wards in the city of Carthage that the necessary adjustment as to the ward and precinct location of registered voters should be made by a transfer of registration by the county clerk of Jasper County.

It is the further opinion of this department that the cost of such transfer should properly be borne by Jasper County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar

GIFTS:
INSTRUCTORS:
PRISONS:

A gift may be accepted for use within the penitentiary to further the recreation, music and fine arts program or to build a building to serve the needs for extra-curricular activities in the prison. The warden may permit visitors to instruct prisoners when the visiting instructor does not assume supervisory control of the prisoners even though the visiting instructor may be paid by some organization or individual in no way affiliated with the State of Missouri.

April 29, 1959



Honorable E. V. Nash, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

You recently asked our opinion and after conference with you the request was amended and is as follows:

"1. Can a gift of money on behalf of the Missouri State Penitentiary for men be accepted from an individual or organization for use within the penitentiary to further the recreational, music and fine arts program which is made available to the inmate population?

"2. Can a gift of money on behalf of the Missouri State Penitentiary for men be accepted from an individual or organization to be used in the construction of a building? The building would not be one employed in the housing, industry or general operational program of the institution, but one to serve the needs for extra-curricular activities such as church services, movies, boxing exhibitions, plays, concerts and similar activities.

"3. Can the Missouri State Penitentiary for Men accept the services of an instructor or supervisor, whose salary might be paid by an individual or organization? The organization or individual in no way affiliated with the State of Missouri or the state penitentiary."

Honorable E. V. Nash

A search of the statutes reveals that the Department of Corrections and the Penitentiary are not specifically authorized to accept gifts but there is no prohibition in the statutes against accepting such gifts.

Section 33.550 of the Revised Statutes of Missouri, 1949, reads as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the director of revenue shall be and is hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor or assignor of said property and said official, so that the right and title to such property shall pass to and vest in this state, and all such property so vested in this state and the proceeds thereof when collected may be appropriated for educational purposes, or for such other purposes as the legislature may direct."

This provision authorizes the Director of Revenue to receive gifts on behalf of the State on such terms and conditions as he may agree on with the donor. We also call attention here to the Mississippi Valley Trust Company v. Ruhland, 222 S.W. 2d 750, 752 [1], which reads as follows:

"[1] The heirs say the right to take property by testamentary gift 'is not a natural right but a creature of law,' subject to the power of the sovereign to restrict or prohibit entirely. In re Rogers' Estate, Mo.Sup., 250 S.W. 576, 577 (1); State ex rel. McClintock v. Guinotte, 275 Mo. 298, 310 (1), 204 S.W. 806, 807 (1); 68 C.J. 503, § 122; 59 C.J. 164, § 276; 56 Am.Jur. 138, § 153; and contend that, in the absence of specific legislative authority, it is the policy of Missouri to deny to State institutions the capacity to accept gifts, including testamentary gifts, from private individuals. The trial court, in a well considered opinion, reached the opposite result; and we agree thereto."

On the basis of the above-cited and the statutory quotation we feel that the policy of the law in Missouri is well

Honorable E. V. Nash

settled and allows the acceptance of gifts by state institutions. The gift is, of course, subject to the control of the Legislature to be used for the purpose designated.

The Legislature has given the Department of Corrections control over the Missouri State Penitentiary. See Section 216.010 and Section 216.020, RSMo Cum. Supp. 1957. Therefore, any building to be erected on prison grounds would have to meet with the approval of the Department of Corrections as does the prison program generally. The warden has authority to extend permission to individuals to visit the institution under such regulations as he may prescribe. See Section 216.435, RSMo Cum. Supp. 1957.

Now, for the answers to your specific questions. Question one reads as follows:

"1. Can a gift of money on behalf of the Missouri State Penitentiary for men be accepted from an individual or organization for use within the penitentiary to further the recreational, music and fine arts program which is made available to the inmate population?"

We feel that the Director of Revenue can accept such a gift to be used at the Penitentiary subject, of course, to legislative direction.

Question two reads as follows:

"2. Can a gift of money on behalf of the Missouri State Penitentiary for men be accepted from an individual or organization to be used in the construction of a building? The building would not be one employed in the housing, industry or general operational program of the institution, but one to serve the needs for extra-curricular activities such as church services, movies, boxing exhibitions, plays, concerts and similar activities."

We feel such a gift may be accepted by the Director of Revenue and used at the prison subject to legislative direction.

Question three reads as follows:

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"3. Can the Missouri State Penitentiary for Men accept the services of an instructor or supervisor, whose salary might be paid by an individual or organization? The organization or individual in no way affiliated with the State of Missouri or the state penitentiary."

From our conversation on this matter, it was determined that the instructor or supervisor in this case is to be a person skilled in an art or craft who does not actually have supervisory control of the prisoners but rather comes to the prison several times a week to supplement and assist prison instructors in offering certain courses. The prison employee is to be present at all times and in actual charge of the prisoners and the instructor complies with all prison regulations. We feel that under the statutes a person may be permitted to visit the penitentiary by the warden and conduct classes and assist prison personnel in the manner above described even though the instructor is not paid by the State and may be paid by an outside interest.

CONCLUSION

Therefore, it is our opinion that a gift may be accepted for use within the penitentiary to further the recreation, music and fine arts program or to build a building to serve the needs for extra-curricular activities in the prison. We further feel that the warden may permit visitors to instruct prisoners when the visiting instructor does not assume supervisory control of the prisoners even though the visiting instructor may be paid by some organization or individual in no way affiliated with the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON
Attorney General

JEC:mc

ASSESSORS: The provisions of Section 53.140, RSMo Cum. Supp.,
COUNTY ASSESSOR: 1957, would not prohibit the compensation of clerical or stenographic assistants within the limits
COUNTY COURT: of 53.095, RSMo Cum. Supp. for making entries in the real and tangible personal assessment books.

June 2, 1959



Honorable Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri

Dear Sir:

Reference is made to your request for an official opinion which request reads as follows:

"I would appreciate an opinion on the following questions:

"Is the Clerical or stenographic assistants to the County Assessor in Class Four counties entitled to receive the compensation provided for in Section 53:095 for performing work for which specific compensation is allowed the assessor under Section 53:140?"

"Is the County Assessor the sole judge of whether work performed under the provisions of Section 53:095 is necessary for the efficient performance of the duties of his office, even though it includes the work of making the personal and real estate tax books?"

Your inquiry involves an interpretation of Sections 53.095 and 53.140, RSMo Cum. Supp., 1957. Said Sections read as follows:

"53.095. The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

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"53.140. The compensation of the county assessor in counties of the fourth class shall be sixty-five cents per list, and each county assessor shall be allowed a fee of eight cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book. Nothing contained in this section is so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

Section 53.095 authorizes and empowers the county assessor in counties of the third and fourth class to appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of the office. Your inquiry first asks whether duly appointed clerical or stenographic assistants are entitled to compensation for performing work for which specific compensation is allowed the assessor under Section 53.140, supra. From information submitted in connection with your opinion request, we understand that the work to which you refer is the actual physical act of making entries in the real and tangible personal property tax books.

Section 53.140 provides for the allowance to the assessor of a fee of eight cents per entry for making the real estate and tangible personal assessment books. However, for the reasons hereinafter stated we believe that this Section would not prohibit the allowance of compensation to clerical or stenographic assistants for actually making the entries in the tax books.

The actual physical act of making the above referred to entries in the tax books is not an act requiring the exercise of personal discretion or judgment. On the other hand, it is a mere ministerial act which does not require the exercise of discretion. It has been held that under certain circumstances a mere ministerial act not requiring the exercise of discretion may be delegated. See *State ex rel vs. Reber*, 226 Mo. 229.

Further, it is generally stated that a ministerial act done in the presence and under the authority and direction of an officer duly authorized to perform the act is the act of the officer himself. 67 C.J.S. Officers, Section 152, page 451. Also, in regard to the authority of a county officer to discharge the duties and responsibilities of his office through employees and assistants, see *State ex. inf. vs. Cumpston*, 240 S.W.2d 877.

Honorable Ralph B. Nevins

We conclude that the actual manual physical work of making the entries in the tax book is an act which can lawfully be performed by duly authorized stenographic or clerical assistants and is not a duty which can only be performed by the assessor.

In view of the fact that the making of such entries is a duty which can be performed by clerical or stenographic assistants, we are of the opinion that it would be proper to pay such clerical and stenographic assistants for performing such duties within the limits authorized by Section 53.095 supra, notwithstanding the fact that the assessor is allowed a fee for making such entries by virtue of the provisions of Section 53.140.

As we view the provisions of Section 53.140, it is merely a means by which the Legislature has geared the remuneration of the assessor to the actual responsibilities of the office and does not have within its meaning any prohibition express or implied against the payment of clerical or stenographic assistants for performing the manual physical work connected with the above referred to duties. It is to be borne in mind that while the manual physical work involved in connection with these duties may be performed by clerical or stenographic assistants, the responsibility, supervision, management and control rest with the officeholder.

In regard to question number two, we are enclosing herewith an opinion of this office to Joe Collins, Prosecuting Attorney of Cedar County under date of December 31, 1951, holding that the county assessor who is vested with the sole power to make the appointment would also make the determination of the necessity for stenographic or clerical assistance.

CONCLUSION

Therefore, it is the opinion of this office that the provisions of Section 53.140, RSMo Cum. Supp., 1957, would not prohibit the compensation of clerical or stenographic assistants within the limits of 53.095, RSMo Cum. Supp. for making entries in the real and tangible personal assessment books.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:lvd

Enclosure

HOUSE BILL NO. 261: House Bill No. 261 enacted by the 70th General Assembly applies to prisoners in an institution of the Department of Corrections who have been confined in a state mental hospital but who have been returned to the institution prior to the effective date of the act.

August 11, 1959



Warden E. V. Nash
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"An official opinion is requested in regard to House Bill #261 passed by the 70th General Assembly.

"Attention is directed to Section 2, page 3 of the Bill. 'The provisions of this act also apply to any prisoner conveyed to the state mental hospital by order of the Governor as provided by Section 549.040, Revised Statutes of Missouri, prior to the effective date of this act.'

"Does this section mean that a prisoner who had been transferred to the state mental hospital prior to the date of August 29, 1959, and since been returned to the state penitentiary is to receive credit on his penitentiary sentence for the time he may have spent in the mental hospital, thereby, making this bill retroactive and effecting all prisoners now held in the state penitentiary who have in the past been transferred to the mental hospital and later returned to the penitentiary."

The general purport of House Bill No. 261, supra, is to apply to the term of a person committed to the Department of Corrections the time spent by such person in a state mental hospital. This is set forth in Section 549.050 of the bill, which section reads:

"When a prisoner becomes mentally ill or incapacitated and is committed or transferred to a state mental hospital, the

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time spent at the mental hospital shall be calculated as a part of the sentence imposed upon him whether the sentence is an indeterminate one or for a definite period of time. The time spent at the mental hospital shall, in addition to any reduction of time allowed under section 216.355, RSMo, be deducted from the term of the sentence."

The portion which we have to construe is subsection 2 of numbered paragraph 3 of Section 549.051 of the bill, which section reads:

"The provisions of this act also apply to any prisoner conveyed to the state mental hospital by order of the governor as provided by section 549.040, RSMo, prior to the effective date of this act."

The specific part of this section which must be construed are the words "prior to the effective date of this act."

We see nothing in the bill which would limit the application of the word "prior" to any particular time. Neither is there anything in the bill which would indicate that it applies only to prisoners who are still in the state mental hospital upon the effective date of this bill and not to prisoners who have been in the state mental hospital but who have been conveyed back to the prison at the time this act becomes effective. We believe, therefore, that the bill does apply to persons presently in prison who have spent time in a state mental hospital, and that after the effective date of the act, time so spent in the mental hospital should be applied upon their sentence. We do not consider that this holding is equivalent to a holding that the bill is retroactive.

CONCLUSION

It is the opinion of this department that House Bill No. 261 enacted by the 70th General Assembly applies to prisoners in an institution of the Department of Corrections who have been confined in a state mental hospital but who have been returned to the institution prior to the effective date of the act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bw

HOUSE BILL NO. 262: It is the opinion of this department that House Bill No. 262, enacted by the 70th General Assembly, is not retroactive; that it became effective on August 29, 1959; that it does not apply to persons confined, prior to August 29, 1959, in institutions maintained by the Department of Corrections.

September 15, 1959



Honorable E. V. Nash
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"An official opinion is requested with respect to House Bill #262 recently passed by the 70th General Assembly.

Are the contents of this bill to be retroactive, effecting men presently confined at the state penitentiary?"

House Bill No. 262, to which you refer, reads:

"Section 1. When a person has been convicted of a criminal offense in this state

(1) the time spent by him in prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections shall be calculated as a part of the sentence imposed upon him; and

(2) the time spent by him in prison or jail prior to his conviction and the date on which sentence is pronounced may, in the discretion of the judge pronouncing sentence, be calculated as a part of the term of the sentence imposed upon him.

2. When the time spent in prison or jail is calculated as a part of the term of the sentence under the provisions of subdivision 1 of this section, the time so spent in

Honorable E. V. Nash

prison or jail shall, in addition to any reduction of time allowed under section 216.355, RSMo, be deducted from the term of the sentence.

3. It is the duty of the officer required by law to deliver a convicted person to the state department of corrections to endorse upon the commitment papers the length of time spent by the person in a prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections, and if, by the terms of the sentence, the time spent in prison or jail prior to conviction and sentence is to be calculated as a part of the term, the officer shall also endorse upon the commitment papers the length of time spent in prison or jail prior to the person's conviction and sentence."

We see nothing in this bill which would make it retroactive. We direct attention to the case of Clark Estate Co. v. Gentry, 240 S.W.(2d) 124. In that case, the Missouri Supreme Court stated (1.c. 129[6]):

" * * * The rule is that, in the absence of clear legislative intent to the contrary, the effect of statutes is prospective only. 59 C.J., 'Statutes,' Sec. 694, p. 1169; 50 Am. Jur., 'Statutes,' Sec. 478, p. 494; Lucas v. Murphy, 348 Mo. 1078, 156 S.W.2d 686; and Cleveland v. Laclede-Christy Clay Products Co., Mo. App., 113 S.W.2d 1065. * * * "

In the instant case, there certainly is no "clear legislative intent" that the statute in question is to be retrospective, and it is therefore our conclusion that it is prospective only.

Such bill became effective on August 29, 1959.

CONCLUSION

It is the opinion of this department that House Bill No. 262, enacted by the 70th General Assembly, is not retroactive; that it

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became effective on August 29, 1959; that it does not apply to persons confined, prior to August 29, 1959, in institutions maintained by the Department of Corrections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

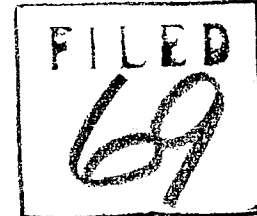
Yours very truly,

John M. Dalton
Attorney General

HPW:om

ASSESSORS: Section 53.095, RSMo Cum. Supp. 1957, is to be construed to apply only to clerical and stenographic
OFFICERS: assistants for county assessors and not to be applicable to the employment of deputy assessors.

April 20, 1959



Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Paul:

This is in reply to your letter of February 3, 1959, requesting an opinion interpreting Section 53.095, RSMo Cum. Supp. 1957, which request reads as follows:

"There has been a question arise as to the interpretation of Section 53.095 of the Revised Statutes of the State of Missouri.

"The first question is concerned with the following part of the section: 'The County Assessor * * * may appoint and fix the compensation * * *.' Does this mean that the County Assessor must file with the County Court such appointees and the compensation to be paid to each, or does he have within his discretion who shall be appointed and what their compensation shall be without advising the Court?

"The second question that has presented itself is the construction of the following part of said section: 'of such clerical or stenographic assistance as may be necessary for the efficient performance of the duties of his office.' The question that has presented itself on this construction is whether or not deputy assessors in the field making personal assessments can be paid from this fund."

Honorable James L. Paul

We are enclosing herewith two previous opinions which we feel answer the first question posed by your inquiry regarding the employment of clerical help by the assessor, and its relationship to the county court. These opinions are our opinion of December 31, 1951, directed to the Honorable Joe Collins, Prosecuting Attorney of Cedar County, and our opinion of February 1, 1954, addressed to the Honorable Earl Saunders, Prosecuting Attorney of Jefferson County. Should these opinions fail to fully answer your question, please inform us and we will be happy to further reply.

Your second inquiry concerns employment of deputy assessors under Section 53.095, RSMo Cum. Supp. 1957. That section reads as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

Section 53.095, RSMoCum. Supp. 1957, was enacted as House Bill No. 70 of the Laws of 1951. See Laws of Missouri, 1951, at page 380.

The correct legislative title to this act is "An act to provide for clerical or stenographic assistants for county assessors in counties of classes three and four."

The title of a statute is necessarily a part thereof and is to be considered in the construction thereof. This is a requirement imposed by Section 23, Article III, Missouri Constitution, 1945, which provision reads in part:

"No bill shall contain more than one subject which shall be clearly expressed in its title, * * *."

Honorable James L. Paul

See also A. J. Meyer & Co. v. Unemployment Compensation Comm., 348 Mo. 147, 152 SW2d 184, at l.c. 189, wherein the Missouri Supreme Court said:

" * * * Under our constitution the title of a statute is a part thereof, and is to be considered in construction. * * *"

In the Official Edition of the Revised Statutes, Cumulative Supplement of 1957, the heading of this section is entitled: "Appointment of assistants in class three and four counties - salaries -," while the heading in Vernon's Annotated Missouri Statutes, page 347, reads: "Appointment of deputies in class three and four counties - salaries."

To the contrary of legislative titles, headings of statutory sections are not an essential part thereof and, consequently, are not material to statutory construction.

In State v. Mauer, 255 Mo. 152, 164 SW 551, at l.c. 552, the principle is stated as follows:

"The headings of chapters, articles, or sections are not to be considered in construing our statutes; these indicia are mere arbitrary designations inserted for convenience of reference by clerks or revisers, who have no legislative authority, and are therefore powerless to lessen or expand the letter or meaning of the law.
* * *"

Neither the title nor the substantive provisions of Section 53.095, RSMo Cum. Supp. 1957, pertain to the employment of deputy assessors. Headings of this statute, either in the Official Missouri Statutes or in Vernon's Annotated Missouri Statutes, are but to be construed as a part of the statute itself.

CONCLUSION

Therefore, it is the opinion of this office that Section 53.095, RSMo Cum. Supp., authorizes only the employment of

Honorable James L. Paul

clerical and stenographic assistants. It does not pertain to
or authorize the employment of deputy assessors.

Yours very truly,

JOHN M. DALTON
Attorney General

JED:ld;lc;ml
2 enclosures

MAGISTRATE COURT: Magistrate court costs in criminal cases for which
JURY FEES: the county is liable should be paid from class ~~five~~
COUNTY BUDGET: five expenditures under Sections 50.680 and 50.710,
RSMo 1949. Such costs must be paid whether or not
the county court has provided for the payment of such from class five
expenditures in their current county budget and, in event of such
failure, said costs may be paid from any surplus available in class
six or unused funds of other classes may be transferred to class five
in order to pay said costs.

July 8, 1959



Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Paul:

This department is in receipt of your recent letter in which
you request us to furnish you with our official opinion on the
following questions:

"Where a defendant, charged with a misdemeanor,
demands a jury trial and at the conclusion is
acquitted, from which class should warrants be
paid by the county?"

I assume that the answer to the above question
will cover the following, but in the event it
does not, please advise: Where a defendant,
charged with a misdemeanor demands a jury
trial and is found guilty and elects to lay
his time out in jail rather than pay the cost,
from which class should this be paid?"

Section 550.050, RSMo 1949, provides:

"1. Every person who shall institute any pros-
ecution to recover a fine, penalty or for-
feiture shall be adjudged to pay all costs if
the defendant is acquitted although he may
not be entitled to any part of the same.

2. When such prosecutions are commenced by a
public officer whose duty it is to institute
the same, and the defendant is acquitted, the
county shall pay the costs; if he is convicted,
and unable to pay the costs, the county shall
pay all the costs, except such as were incurred
on the part of the defendant."

It is also provided in Section 550.030, RSMo 1949, that the
county shall pay the costs in a criminal case:

Honorable James L. Paul

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

The above quoted statutes require the county to pay the costs in a misdemeanor case, except those incurred by defendant, in two instances: (1) when the defendant is acquitted, and (2) when the defendant is convicted but unable to pay the costs. We would next direct your attention to Section 50.710, RSMo 1949, which provides that the county shall classify its proposed expenditures as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals).

Class 2. Expense of conducting circuit court and elections, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class two shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.

Class 3. Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed.

Class 4. Pay or salaries of officers and office expense. List each office separately and the deputy hire separately. (County clerk shall prepare estimate for the county court but his failure does not excuse the court.)

Honorable James L. Paul

Class 5. Contingent and emergency expense.-- The county court may transfer any surplus funds from class one, two, three, and four to class five to be used as contingent and emergency expenses. Purposes for which the court proposes the funds in this class shall be used shall be shown.

Class 6. Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class six unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest; provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

(See also Section 50.680, RSMo 1949.)

We note and call your attention to the fact that there is no express provision for charging payment of magistrate court costs to any particular class of expenditures within the provisions of Sections 50.680 and 50.710, supra. In the old Missouri case of State ex rel. Vaughan et al. vs. Appleby et al., 136 Mo 408 (1896), the Greene County court refused to issue warrants for payment of certain criminal costs which had been duly certified to them for payment. In a mandamus proceeding to compel the court to pay the aforementioned costs, the Missouri Supreme Court ruled that criminal costs were to be denominated as contingent and thus payable from the class five or contingent county fund as provided by Section 7663, RSMo 1889.

It is not clear from reading this case whether the criminal costs were those of the circuit court or the magistrate court, but

Honorable James L. Paul

the court did construe Section 7663, supra, which reads, in part, as follows:

" * * * A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the contingent fund of such county; which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year."

The court in the above-mentioned case, in particular, had this to say concerning what class of expenditures criminal costs should be charged to: (l.c. p. 413)

"It is impossible for the court, in advance, to more than approximate that amount of money necessary to meet all proper demands for the respective purposes mentioned in section 7663. This is particularly so in respect to the demands that may be denominated 'contingent,' in which criminal costs are included. The liability of the county for criminal costs is not under the control of the county courts, is not created by them, nor is it in their power to so regulate it as to limit its amount to a sum within the funds set apart for its payment."
(Emphasis ours.)

In view of the above case and its ruling, we are of the opinion that the costs of a magistrate court in a case where the defendant is acquitted by jury, or found guilty by jury, and unable to pay the costs accrued in said trial, should be charged and payable from class five expenditures, Section 50.710, supra.

This conclusion, we believe, is further supported by the fact that criminal costs expenditures such as here considered, by process of elimination, naturally fall within the category of expenditures classified as class five in Section 50.680 and 50.710, supra. Classes one, two, three and four expenditures authorized by Section 50.710, supra, pertain to specific expenditures. The courts of this state have ruled in the cases of Adair County vs. Weber, et al., 250 S.W.2d 492, and State ex rel. Strong vs. Cribb, 273 S.W.2d 246, that the classes of expenditures provided by Sections 50.680 and 50.710, supra, must be strictly complied with by county courts and county treasurers. These cases hold that county courts are not permitted to exercise their discretion in these budgetary mat-

Honorable James L. Paul

ters, but on the contrary, said cases hold that they must strictly follow the provisions of Sections 50.680 and 50.710 and pay claims on any from the authorized classes of expenditures. With these cases in mind, it is apparent, therefore, that the criminal costs incurred by a magistrate court in cases where the defendant is tried by jury and acquitted, or tried by jury and convicted, and unable to pay said court costs, would naturally fall and should be charged to class five expenditures, Sections 50.680 and 50.710, supra.

We note from the way your opinion request is worded that the county court may not have provided in this case for payment of magistrate criminal costs from class five expenditures in preparing this current county budget. If such be the case, the criminal costs of magistrate court still must be paid and said liability cannot be avoided on the ground there are no funds available in class five expenditures to pay said costs.

The court in Vaughan et al. vs. Appleby et al., supra, had this very same situation to contend with and ruled as follows:

"We do not think section 7663 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or other reason, why the court may not transfer the surplus in order to make up the deficiency. Indeed sections 3189 and 3190 expressly provide for such transfer."

The attorney general reached a similar conclusion under the present budget law in an opinion, copy of which is enclosed, dated August 16, 1943, addressed to Honorable W. C. Huffman. Therefore,

Honorable James L. Paul

magistrate court criminal costs for which the county is liable are to be paid regardless of whether or not the county has provided funds in class five expenditures for payment of said costs. Any surplus in class six expenditures may also be employed for such purpose in those cases where the county court has failed to budget or provide for said costs in class five expenditures or when funds budgeted in class five are insufficient for such purpose. In addition, as stated in the Vaughan case, supra, funds unused in other classes of expenditures may be transferred to class five expenditures and used for such purpose.

CONCLUSION

It is the opinion of this office that magistrate court costs in criminal cases for which the county is liable should be paid from class five expenditures under Sections 50.680 and 50.710, RSMo 1949. Such costs must be paid whether or not the county court has provided for the payment of such from class five expenditures in their current county budget and, in event of such failure, said costs may be paid from any surplus available in class six or unused funds of other classes may be transferred to class five in order to pay said costs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JBA:mjb/om

Enclosure

FOREST CROP LAND: It is the opinion of this department that the law setting forth classifications of forest crop land and providing for grants to counties in lieu of taxes for such is valid and that use of such classified forest crop land in a manner contrary to the rules promulgated by the Forest Crop Land Commission established by Chapter 254, RSMo 1949, subjects such land to removal from classification as forest crop land.

February 18, 1959

Honorable T. A. Penman
Missouri House of Representatives
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"In connection with my renewed study of free open range I have learned of an opinion of your department (Oct., 1954) concerning open range and our forest crop land. This opinion cast doubts on the validity of the forest crop land classifications when the land classified is subjected to free open range grazing.

"I am in complete agreement with this opinion. All technical authority states that forests should not be grazed, especially hardwoods. Also the National Forest Service states officially that open range 'cannot be regulated.' Finally our Forestry Act statutes require a written plan of grazing regulations to be submitted for approval by the Conservation Commission. Such plans are completely impossible for a land owner whose property is subjected to open range grazing. In short, lands in open range should never have been classified as forest crop land.

"Generally speaking the tracts of forest crop land are submitted for classification after a heavy timber harvest and/or after the land changes ownership; going from an owner who gave the timber poor management to an owner who hopes to practice good management. In such cases it is vital that no concentrations of livestock be allowed to root or trample or

Honorable T. A. Penman

wallow or eat the desirable seedlings. Authorities point out that these desirable timber producing species are most preferred by domestic animals.

"Since the classifications are probably invalid when forest crop land is subjected to free open range grazing, it should follow that the payments (in lieu of taxes) to the open range counties on this same area are also invalid.

"May I have an opinion on the validity of these payments as I have outlined? The area involved is estimated to be about three fourths of our total forest crop land or about 300,000 acres."

From the above letter, it would appear that the question which you are asking us is whether classifications of forest crop land become invalid when such land is subjected to free open range grazing and if, therefore, the payments in lieu of taxes to the open range counties are also invalid.

Let us state first that we believe the classification of forest crop lands and the payments made thereon in lieu of taxes to be constitutional. Section 7 of Article X of the Missouri Constitution reads:

"Relief from taxation--forest lands--obsolete, decadent, or blighted areas--limitations.--For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law, may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe."

Based upon the foregoing section and article of the Missouri Constitution, the state legislature enacted Chapter 254 which sets forth in detail the manner in which forest crop lands shall be classified, the manner of tax relief, the manner of assessment, private plan of forest management, grants to counties in lieu of taxes, and other related matters, all of which it would appear to

Honorable T. A. Penman

us the legislature was authorized to do by virtue of the grant of authority to it by Section 7 of Article 10 of the Constitution aforesaid.

As to the methods which shall be followed with respect to forest crop land, these are matters which are vested in the state commission which is provided for in numbered paragraph (1) of Section 254.020, RSMo 1949, and which reads:

"(1) The word 'commission' shall mean the conservation commission of Missouri upon which, by the terms hereof impressed, are vested the responsibilities for the administration hereof in conformity with section 40 to 46 of article IV of the Constitution of Missouri; and the words 'rules and regulations' shall mean those made by the commission pursuant thereto;"

Section 254.200, RSMo 1949, reads:

"1. When any lands have been so classified the classifications shall be continued as long as proper forest conditions and practices are maintained and continued thereon, and for such periods of time as do not exceed the provisions of this chapter.

"2. Use of such lands for pastures, destruction of tree-growth by fire and failure of owner to restore forest conditions, removal of tree-growth and use of land for other purposes, or any changed condition which in the opinion of the commission shall show that the requirements of this chapter are not being fulfilled, or the use of such lands for pasture in violation of any regulations promulgated by the commission shall be sufficient ground for the cancellation of such classification. If the commission find the provisions of this chapter are not being complied with, it shall forthwith cancel the classification of such lands, sending notice of such cancellation to the assessor, the county clerk of the county in which the land is situated and to the owner of such lands. Such lands shall thereafter be taxed as other lands. (L. 1945 p. 672 §11)"

Honorable T. A. Penman

You will note from the above that use of forest crop lands for pastures may be grounds for removing such land from classification as far as crop land if, in the opinion of the commission, such pasturage is in violation of any regulations which the commission has promulgated. Therefore, it would appear to us that use of land classified as forest crop lands in a manner which is not consistent with the rules and regulations of the commission would serve to remove that land from its favored position as forest crop land but we do not see how pasturage of such land in violation of the rules of the commission could serve to render unconstitutional or invalid the law setting forth such classification. We do not in fact believe that such would be the effect but rather that the effect would be simply to remove the land from the forest crop land classification.

CONCLUSION

It is the opinion of this department that the law setting forth classifications of forest crop land and providing for grants to counties in lieu of taxes for such is valid and that use of such classified forest crop lands in a manner contrary to the rules promulgated by the Forest Crop Land Commission established by Chapter 254, RSMo 1949, subjects such land to removal from classification as forest crop land.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

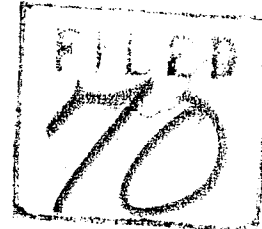
John M. Dalton
Attorney General

HPW:om:hw

UNIVERSITIES AND COLLEGES:
SCHOOLS:
SALES TAXATION:
TAXATION:
EXEMPTION FROM TAXATION:

The University of Missouri Press which publishes worthy special interest works not of sufficient interest to make their commercial publishing worthwhile is engaging in an educational function or activity and, therefore, sales at retail by the University of Missouri Press to private individuals are exempt from sales tax.

April 21, 1959



Honorable Paul M. Peterson
General Counsel
University of Missouri
1 Tate Hall
Columbia, Missouri

Dear Mr. Peterson:

You recently asked our office for an opinion as follows:

"Request is hereby made by the Board of Curators of the University of Missouri for an opinion of your office as to whether the sale of books by The Curators of the University of Missouri as hereinafter detailed falls within the exemptions provided in Section 144.040 RSMo 1949.

"The Curators of the University of Missouri has created the University of Missouri Press as a department of the University for the purpose of the publication and distribution of educational books.

"The purpose of the University of Missouri Press, as of all other university presses, is to publish worthy educational books. In announcing the establishment of the Press, Dr. Ellis, President of the University, stated that its purpose was to provide for the publication of worthy books that are of special interest to the State of Missouri or to the University. He further stated: 'Our purpose is not to compete with commercial publications, but to provide a means of publishing books that are

Honorable Paul M. Peterson

useful to the State and to publish valuable materials that grow naturally out of the University's program of research and teaching, and materials from other colleges and universities and research agencies.'

"While the books published by the University of Missouri Press will for the most part be sold wholesale to distributors, the Press will, however, supply books to individuals at retail. It is with these retail books, of course, that we are concerned.

"It is my opinion that these sales are incidental to and made in the course of the University carrying out its educational functions and activities, and therefore fall within the exemptions provided in Section 144.040 RSMo 1949, but the Curators would like your official opinion thereon."

Section 144.040 of the Revised Statutes of Missouri, 1949, reads as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of this chapter all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

According to your original request and the supplemental information provided by you, the facts are that the University of Missouri has established a University of Missouri Press service to meet a need not being met by established commercial publishing houses. It is the intention of the University publishing service to publish "special interest" books and research projects that are not of general interest and could not

Honorable Paul M. Peterson

for that reason be published for a profit by the established commercial publishing houses. The University of Missouri Press intends to publish these research papers and the like for the purpose of disseminating education and not for the purpose of profit.

We find no authority in Missouri directly in point on this question. From a reading of the exemption statute, it becomes apparent that if these works are published as an educational function or activity of the University, they are exempt from sales tax when they are sold by the University at retail to private individuals. If this is not an educational function or activity, then sales tax would, of course, be due and owing. We must then determine whether or not this is an educational function or activity.

In *Squire v. Students' Book Corporation*, 191 F. 2d 1018, the United States Court of Appeals held that a corporation wholly owned by an educational institution that sold books and supplies to students and faculty members and returned any and all profits to the educational institution was exempt from Federal income taxation as being operated exclusively for an educational purpose. The court noted also in that case that the business enterprise in which the taxpayer was engaged bore a close and intimate relationship to the functioning of the college.

It was held in *State of Tennessee v. Southern Publishing Association*, 169 Tenn. 257, 84 S.W. 2d 580, that a not for profit corporation could not properly run a commercial printing and publishing business. See also 100 A.L.R. 576.

Corpus Juris Secundum defines educational purposes at 28 C.J.S., pages 834 and 835, as follows:

"A broad phrase, including all those uses which reasonably serve the purposes of education as it is commonly understood. As applied to a school, the term is not limited to purposes of class-room work solely, but includes any activity necessary to the proper maintenance and operation of a school."

We feel that educational purposes and educational functions and activities are synonymous terms.

Certainly the founding of a press to publish works of

Honorable Paul M. Peterson

special interest to the educational world which in most instances would not be of sufficient general interest to allow their publication by a commercial publisher is a function that is necessary to the proper furthering of research activity and education. This is not a commercial enterprise aimed at profit making but rather an enterprise aimed at the proper dissemination of research and educational studies.

CONCLUSION

On the basis of the above facts and in view of the above-cited authority, it is our opinion that the University of Missouri Press is operated in furtherance of an educational function or activity of the University of Missouri and is thereby exempt from sales tax on retail sales made to private individuals.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

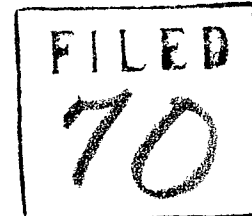
JOHN M. DALTON
Attorney General

JEC:mc

HIGHWAY DEPARTMENT:
HIGHWAY FUND:
UNEMPLOYMENT COMPENSATION:

It would require a constitutional amendment to amend Section 30, Article IV of the Constitution of 1945 in order to permit the Highway Department to pay unemployment compensation to its employees out of the Highway Fund.

May 1, 1959



Honorable Robert Pentland
Senator, 1st District
Capitol Building
Jefferson City, Missouri

Dear Senator Pentland:

You have requested an opinion from this office concerning the following matter:

"Article 4, Section 30, of the Constitution spells out the various things that the Highway Department can spend money for.

"I would like to find out if it would require a constitutional amendment to permit the Highway Department to pay unemployment compensation to its employees."

Section 30 of Article IV of the Constitution of Missouri, 1945, provides that all state funds from certain sources less certain authorized expenses shall be placed in the highway fund to be used for the purposes of constructing and maintaining an adequate system of highways in Missouri as set out in the Constitution. The pertinent part of this section reads as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacturer, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of

Honorable Robert Pentland

maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:"

It will be noted that this section specifies those matters other than the construction, improvement and maintenance of highways for which these funds may be spent. This exception is in considerable detail and from the provisions of this section we would say that funds from this source could not be used to pay unemployment compensation to the employees of the Highway Department. You will note that the Constitution specifically authorizes payment of workmen's compensation and payment to an employee retirement program. We believe that the payment of unemployment compensation is an expenditure of the same general nature as these specifically enumerated expenses and since the Constitution does not authorize and specifically mention expenditures for unemployment compensation we would conclude that expenditures for such purposes are not authorized and would be unconstitutional.

It would, therefore, require a constitutional amendment to authorize the highway department to pay unemployment compensation to its employees from the highway fund.

If it were proposed that an appropriation to the highway department be made by the Legislature from general revenue for the purpose of paying unemployment compensation to a highway department employee, then other issues would be raised. However, we refrain from going into such other issues in view of the fact that your question is apparently limited to the use of the highway fund for this purpose.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that a constitutional amendment would be necessary to authorize the highway department to pay unemployment compensation to its employees from the highway fund.

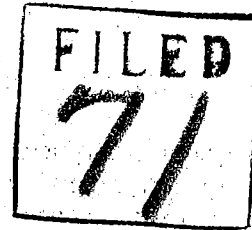
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

ATHLETIC COMMISSION: When a proposed public dinner, sponsored by a labor
BOXING: union, is to be held at a St. Louis hotel, at which
LICENSE NOT REQUIRED: a special feature is a boxing program, and the only
WHEN: tickets offered for sale, or sold, are for the dinner, the event is not a boxing, sparring or wrestling exhibition within the meaning of Section 317.020, RSMo Cum. Supp. 1957. The Missouri Athletic Commission has no jurisdiction over said event and the sponsors are not required to secure the permission of or a license from the commission to hold the dinner.

September 16, 1959



Honorable Charles W. Pian
Chairman
Missouri State Athletic Commission
723 Olive Street
St. Louis, Missouri

Dear Mr. Pian:

This is to acknowledge receipt of your request for a legal opinion reading, in part, as follows:

"It has come to my attention that the Teamsters' Union of St. Louis is going to have a \$100.00 a plate dinner at the Chase Hotel and will present a boxing program as a special feature of the dinner.

They figure, I have learned, to go around the 5% State Tax on admissions, 2% State Tax, 5% City Tax and the regular Federal Admission tax, by advertising the dinner, etc.

Are they violating any of the State Statutes if they go ahead with this plan without my permission? Also can they undertake this venture without having a regular promoters' and matchmakers' license?"

A subsequent letter attempting to clarify said factual situation advises that \$100-a-plate tickets for the proposed boxing program are not limited to members of the Teamsters' Union, the affair is not private, and union members are now soliciting sales of tickets from various business houses and manufacturers.

Section 317.010, RSMo Cum. Supp. 1957, creates the Missouri Athletic Commission, giving it the power provided by Chapter 317, RSMo 1949, as amended.

Section 317.020, RSMo Cum. Supp. 1957, provides the athletic commission shall have certain powers and duties with reference to

Honorable Charles W. Fian

the supervision of all boxing, sparring and wrestling exhibitions held in Missouri and reads as follows:

"That the athletic commission of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and it shall have the power, and it shall be its duty:

(1). To make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admissions thereto;

(2). To accept applications for and issue licenses to contestants in boxing, sparring and wrestling exhibitions held in the state of Missouri as authorized herein; such contestants' licenses to be issued in accordance with rules and regulations duly adopted by the commission;

(3). To accept application for and issue licenses to any bona fide patriotic, benevolent, fraternal or religious organization or local unit thereof, desiring to promote boxing, sparring and wrestling exhibitions, which has been in existence and has held meetings at regular intervals during the year immediately preceding the granting of the license, and to revoke the same at its pleasure; said applications shall designate the city in which the organization or local unit thereof intends to operate, or local unit thereof, to conduct such boxing, sparring and wrestling exhibitions in that city, and no other;

(4). To charge fees for such license of ten dollars for every license issued and to charge five per cent of the gross receipts of any organization holding a license or permit under

Honorable Charles W. Pian

this chapter, derived from admission charges, concession sales, sales of television rights or privileges and from any other source connected with or as an incident to the holding of any boxing, sparring or wrestling exhibition in this state. Such funds to be paid to the division of collection in the department of revenue which shall pay said funds into the state treasury to be set apart into a fund to be known as the athletic commission fund."

The language used in this section indicates it is very broad in scope, empowering the commission to " * * * have general charge and supervision of all boxing, sparring and wrestling exhibitions in the state of Missouri * * *." However, in an opinion of this department written for Honorable Bert Cooper, Director, (State) Department of Business and Administration, on June 11, 1953, the above terms used in Section 317.020, RSMo 1949, were construed.

The event referred to and set out in an earlier part of the opinion was a professional wrestling match sponsored by the Shriners in Kansas City on May 8, 1953. Shriners were the only persons admitted to the show and no admission was charged. It was concluded, among other matters, the athletic commission has jurisdiction and general supervision over only professional wrestling matches at which an admission fee was exacted and that an organization which presents a private wrestling match without a license does not violate any criminal law. A copy of said opinion is enclosed.

Section 317.020, RSMo 1949, quoted in the opinion request, was amended by Laws of 1955, page 757, and is now Section 317.020, RSMo Cum. Supp. 1957. Paragraph 2, authorizing the commission to accept applications to issue licenses to contestants in boxing, sparring and wrestling exhibitions, is one of the amendments to this section. The other amendment is found in paragraph 4. In addition to authorizing the commission to charge a fee of \$10 for a license issued to the sponsoring organization, five per cent of the gross receipts of every boxing, sparring or wrestling exhibition could be charged by the commission as formerly but the amendment specifically states what should be included within the meaning of the terms "gross receipts" and reads:

Honorable Charles W. Pfan

" * * * and to charge five per cent of the gross receipts of any organization holding a license or permit under this chapter, derived from admission charges, concession sales, sale of television rights or privileges and from any other source connected with or as an incident to the holding of any boxing, sparring or wrestling exhibition in this state."

With the exceptions noted above, there is no change in Section 317.020, and it is the same now as when the opinion was written insofar as the conclusion reached and is still a correct construction and application of the law where the facts are the same or similar to those given in said opinion.

In considering the present inquiries, it must first be determined if the proposed event is a public boxing exhibition at which an admission fee is to be charged, within the meaning of Section 317.020, supra. Unless these facts are found to exist, the commission will not have jurisdiction over the event.

We again find it necessary to refer to the enclosed opinion. On pages 5 and 6, the following definitions from Black's Law Dictionary, 3rd Edition, are given of "public" and "private" and read as follows:

"Public -- 'Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; Open to common use. * * *."

"Private -- 'Affecting or belonging to private individual, as distinct from the public generally * * * .'"

On page 5, the case of State ex rel. Wear vs. Business Men's Club, 178 Mo. App. 548, and a local citation at 575,576 was quoted, and which reads as follows:

"Enough has been shown to lead to but one conclusion and that is that the sparring exhibi-

Honorable Charles W. Pfan

tions given under the auspices of this club were accessible to all who cared to witness them and who were able to sign their name to an application and could raise the small amount of money required. This constituted the exhibitions in law and in fact public sparring and boxing exhibitions, and hence unlawful. * * *

The above quoted definitions and portion of the court's opinion in the case cited are fully applicable to the facts given in the present opinion request and will be mentioned later in our discussion.

In describing such event, the opinion request specifically states, "The Teamsters' Union of St. Louis is going to have a \$100-a-plate dinner at the Chase Hotel and will present a boxing program as a special feature of the dinner," The second letter refers to the proposed meeting and states, in part, "It is my understanding that the Teamsters' Union of St. Louis will sell \$100-a-plate tickets to the proposed boxing program to anyone who cares to purchase a ticket, * * *."

The second statement gives the new information that tickets are not limited to union members. When the second statement is compared with that of the opinion request, it is readily seen there is a discrepancy. The former describes the proposed meeting as a dinner at which a special feature will be a boxing program. The second statement describes the contemplated meeting as a proposed boxing program for which tickets are being sold to anyone. Clearly the emphasis in the first statement is on the dinner, while it is on the boxing program in the latter. We are inclined to believe the first statement gives a more nearly accurate account of the facts involved, and for that reason we shall adopt it for the purpose of our discussion.

As we understand the facts which appear to be involved, the proposed meeting sponsored by the Teamsters' Union at the Hotel Chase in St. Louis is a dinner which the general public, or as many of the general public as can purchase admission tickets at \$100 per plate, may attend. One of the special features to be offered for the entertainment of the guests is a boxing program, and one who purchases a dinner ticket and attends the dinner will be permitted to watch the boxing program without payment of any additional admission fees.

Honorable Charles W. Pfan

Apparently the dinner, and not the boxing program, is the primary purpose of the proposed meeting, and it is probably being held to raise funds for the union. Presumably, no one will be admitted to the dining room for the entertainment who has not purchased a ticket for the dinner.

Keeping in mind the primary purpose of the meeting and also the definitions of "public" and "private" given above, it is believed there is no question but what said proposed meeting will be a public event. No complaint has been made that the sponsors have not complied with all applicable statutes and city ordinances concerning license tax or other possible charges for holding the dinner, and it will be assumed such requirements, if any, either have been, or will be, complied with in due time. Therefore, the only question remaining for consideration is whether the admission fee to be charged is for the dinner or for the boxing matches.

In this connection, we direct your attention to the case of *People v. Campbell*, 65 N.Y.S. 114. The defendant was prosecuted for giving a concert without a license. He had been duly licensed to operate a saloon in New York City where the alleged violation of the city charter occurred. The defendant was convicted as charged in the lower court, but the New York Supreme Court reversed the conviction, and in discussing the issues the Court said at l.c. 115:

"The question is whether this was an exhibition, interlude, minstrelsy, or any other entertainment of the stage. I think it clear that it was not. In the case of *Mayor, etc., of New York City v. Eden Musee Amer. Co.*, 102 N.Y. 596, 8 N.E. 41, the court of appeals, in construing a section of the consolidation act which was substantially like the section of the charter in question, said: 'Taking the statute in all its terms, it evidently meant to include all classes of public exhibitions such as are usually conducted upon a stage for the observation and amusement of the public.' It seems that the performance upon this piano was not an exhibition, within the meaning of this definition, which evidently related to the classes of public exhibitions usually conducted or produced upon a stage, at which the

Honorable Charles W. Pfan

public attend for the purpose of seeing the exhibition, and not to a case where music is performed as a mere incident to any business, where no admission fee is charged, and where in fact there is no exhibition. Taking, for instance, the case of a hotel or any other business where incidentally music is performed to attract customers or entertain them while upon the premises, it would seem to be quite clear that that was not an exhibition of minstrelsy or other entertainment of the stage. While it may in some cases be somewhat difficult to define precisely what is an entertainment of the stage, within the meaning of this section of the charter, I do not think that the fact that during the transaction of business a proprietor of an establishment has a person to play upon the piano as an incident to his business constitutes a violation of the statute * * * ."

It is believed that the above quoted case is particularly applicable to the facts before us, as will be presently seen.

The proposed meeting of the Teamsters' Union will be a public event at which everyone who can pay the admission fee of \$100 per plate may attend. Apparently the union has complied with all license tax requirements as to holding a public dinner; the dinner, and not the special feature of entertainment consisting of a boxing program, is of primary importance. There is no evidence that the union is seeking to promote a boxing exhibition within the meaning of Section 317.020, supra, nor is there any evidence of any admission tickets being offered for sale, or being sold, to a proposed boxing exhibition. All the facts seem to point to the offer and sale of tickets for the dinner and for no other event. It does not appear that said section regarding the license tax fees and five per cent of the gross receipts of boxing, sparring or wrestling matches covers situations such as the present one where no such public exhibitions are promoted as such, no admission to same is charged, and the only boxing exhibitions to be offered are in connection with and as a special feature of a dinner, and incidental to it.

Honorable Charles W. Pfan

Therefore, in view of the foregoing, it is our thought the proposed dinner described in the opinion request is not within the jurisdiction of the Missouri Athletic Commission.

Our answer to the first inquiry is the Teamsters' Union of St. Louis will not violate any Missouri statutes if they proceed with their plans to hold the proposed meeting at the Hotel Chase, without first securing your permission.

Our answer to the second inquiry is that such union is not required by law to secure a regular promoters' and matchmakers' license for the proposed meeting.

CONCLUSION

Therefore, it is the opinion of this department that a proposed public dinner, sponsored by a labor union, to be held at a St. Louis hotel, at which one of the special entertainment features is a boxing program, and the only tickets offered for sale, or sold, are for the dinner, that the event is not a boxing, sparring or wrestling exhibition within the meaning of Section 317.020, RSMo Cum. Supp. 1957, giving the Missouri Athletic Commission general charge and supervision over all boxing, sparring and wrestling exhibitions held in the state. The commission has no jurisdiction over said public dinner, and the sponsors are not required to secure its permission before proceeding with their plans, nor are they required to secure a license from the commission under provisions of Section 317.020, RSMo Cum. Supp. 1957, to hold said dinner.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:om

MUNICIPAL AND CIRCUIT
COURT COSTS:
CIRCUIT CLERK:

A cost judgment against a municipality for costs incurred on an appeal to the circuit court from a conviction in a municipal court in instances where upon appeal such conviction is set aside and the defendant is acquitted, may not be recovered except in the case of a city of not less than 300,000 nor more than 700,000 population. When the circuit clerk is involved in litigation in the circuit court, either as plaintiff or defendant, whether singly or jointly with others, the writ of summons and all other process shall be issued by the clerk of the county court.

March 5, 1959

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

I have your letter of December 31, 1958 in which you enclose a letter to you from the circuit clerk of Clay County with a request that we render an opinion to you based upon the letter of the circuit clerk. The letter of the circuit clerk reads:

"I request an opinion from the Attorney General on the following situations that are confronting my office and are of vital importance to the people of Clay County.

1. As you know, we have many Police Court appeals from the various villages, towns and cities of Clay County and it is getting to a point where the majority of these appeals are reversed, that is, the defendant is found to be not guilty by a jury. These cases incur costs and I would like to know if the village, town or city can have a cost judgment sentenced against them and if I could issue execution for the same.

"I am well aware that the statutes formerly prohibited taxing costs against the city, town or village but I think that has been repealed and that now they are liable for costs.

"I would appreciate very much an early reply.

2. I would like an opinion on whom is acting clerk of circuit court in any case that the clerk of circuit court is involved as a litigant. It is my opinion that the County Clerk assumes the duty in that particular case

Honorable Stephen R. Pratt

or cases that the clerk is involved in, and at one time I had the County Clerk do so. However, I am not sure and if I become involved in litigation either as the plaintiff or defendant, I certainly want no error in the case or proceedings."

With respect to your first question, we direct attention to Section 98.027, RSMo Cum. Supp. 1957, which reads:

"If on appeal from a municipal court in any city which has not less than three hundred thousand inhabitants nor more than seven hundred thousand inhabitants, any defendant is acquitted of violating any city ordinance, the city shall pay all costs which accrue on the appeal in the court having jurisdiction of the appeal."

In regard to the situation of the liability of a city not within the purview of Section 98.027, supra, for costs on appeal, which is the matter of your first inquiry, we direct attention to the 1917 case of City of Greenville v. Farmer, 195 Mo.App.Rep. 209, a case determined in the Springfield Court of Appeals. At l.c. 210, the court sets forth the fact situation as follows:

"The defendant (respondent) was prosecuted for the alleged violation of the ordinances of the plaintiff, a city of the fourth class, and on appeal from the police court was acquitted in the circuit court, that court rendering a general judgment for costs against the plaintiff city upon which an execution was issued. The city filed a motion to quash the execution which motion was overruled and later the city filed a motion to retax the costs, which, as to the main contention on this appeal, was likewise overruled. The case here on the city's appeal from the order overruling such motion."

At l.c. 211, the court further states:

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It is held in the case of State

Honorable Stephen R. Pratt

ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S.W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo.App. 1.c. 377, the following language is used: ' . . . It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.' * * *

At 1.c. 213, et seq., the court states:

"Attention is called to the concluding clause in section 9344, Revised Statutes 1909, providing: 'The city shall in no event be held liable for any costs or fees to any officer of the city in any cause tried before the mayor or police judge of such city, unless the defendant be convicted and committed.' It can be seen that this provision, in the first place, is only applicable in cases arising under section 9344 where there is a finding in the verdict that the prosecution was malicious and without probable cause and there was no such finding in this case, and, in the second place, it was put in as a charter prohibition for a city of the fourth class to be held for costs and fees to any officer of the city. This provision in the statute evidently was passed with a mind as to what the city could by ordinance give or not give its officers in the form of fees growing out of prosecutions. This is the view taken in the cases of Fortner v. City of Higginville, 106 Mo.App. 560, 565, 80 S.W. 983, and Kemp v. City of Monett, 95 Mo.App. 452, 69 S.W. 31.

"In addition to the reason that we have been unable to find any statute authorizing the taxation of costs, in a proceeding like this, against a city of the fourth class, we think it would be manifestly wrong to hold the city for attempting to enforce its ordinances in its police regulation; the city is thereby

Honorable Stephen R. Pratt

acting in its governmental capacity or on its governing side and if it were to be mulct in costs in cases where the proceedings are against individuals for the violation of its ordinances it might because of its limited powers to raise revenue become a bankrupt in attempting to police the city, or, on the other hand, would be slow to enforce municipal regulations for fear of becoming liable for the costs."

In view of the above, therefore, we do not believe that a cost judgment may be rendered against a municipality and execution issued for collection of the judgment, with the exception of a city coming within the purview of Section 98.027, supra.

With respect to your second question, it would be our opinion that this situation is governed by Section 483.075, V.A.M.S., which reads:

"1. Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same.

"2. Provided, that where the clerk of the circuit court is a party, plaintiff or defendant, whether singly or jointly with others, to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit court clerk."

CONCLUSION

It is the opinion of this department that a cost judgment against a municipality for costs incurred on an appeal to the circuit court from a conviction in a municipal court in instances where upon appeal such conviction is set aside and the defendant is acquitted, may not be recovered except in the case of a city of not less than 300,000 nor more than 700,000 population.

Honorable Stephen R. Pratt

It is the further opinion of this department that when the circuit clerk is involved in litigation in the circuit court, either as plaintiff or defendant, whether singly or jointly with others, that the writ of summons and all other process shall be issued by the clerk of the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lmw

CITY NIGHT WATCHMEN@
NIGHT WATCHMEN:
CITY OFFICERS:
ARREST:

A night watchman's powers and duties in fourth class cities are to be prescribed by ordinance and include the power to arrest if given by ordinance.



April 14, 1959

Honorable Randolph E. Puchta
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This is in reply to your letter of March 4, 1959, requesting an opinion on two questions regarding the powers and liabilities of a night watchman. Your questions read as follows:

"Does the Mayor and Board of Aldermen of a fourth class city under Sec. 79.230 RSMo. 1949 have the authority to give a night watchman the same powers and duties as an elected marshal?

"If not, would a night watchman appointed by the Mayor and Board of Aldermen and by ordinance given the same duties as a marshal be in violation of 562.180 R.S. Mo. 1949, when exercising or attempting to exercise the duties of the Marshal?"

The answer to the second question, whether or not a night watchman could be arrested for attempting to exercise the duties of the marshal, would necessarily depend upon a negative answer to your first question. Therefore, since we deem the answer to be in the affirmative, we will not attempt to answer your second question.

The Missouri Constitution of 1945 not being pertinent to the question at hand, we now pass to the applicable Missouri statutes in regard to the appointment of night watchmen.

The first applicable provision is Section 79.230, RSMo, providing for the appointment of night watchmen, which we now quote in part:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, * * * *."

Section 79.290, RSMo, provides for the powers and duties of

Honorable Randolph E. Puchta

"officers of every character," which, again, we quote in part:

"The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance. * * *

The council could not by ordinance prescribe powers or duties to a night watchman which would conflict with duties specifically assigned to the city marshal by statute, i.e., duties in connection with city elections under Section 79.030, RSMo.

We next note that Section 79.470, RSMo, grants to the board of aldermen further power to prescribe powers and penalties to carry out and enforce ordinances.

The powers and duties of night watchmen are not set forth in the statute empowering their appointment, and consequently depend entirely on the grant thereof given by ordinance. A night watchman can arrest, providing this power is given by ordinance. Where the power to arrest has not been granted by ordinance, a night watchman has no inherent power to arrest. See *City of Lamar v. Hewitt*, 60 Mo. App. 314, at 315, wherein this rule was stated by the court as follows:

"The charter of cities of the fourth class (article 5, chapter 30, Revised Statutes, 1889) does not empower a night watchman to make an arrest. Section 1652 of the statute provides that the 'duties, powers and privileges of all officers of every character in any way connected with the city government, not herein defined, shall be defined by ordinance.' The complaint in this case fails to allege the ordinance defining the duties of a night watchman; or that any duties were defined by any ordinance. * * * *"

Therefore, the powers other than the power to arrest also depend on extent of the grant by ordinance. In each instance the individual ordinance must be examined in the light of the exercise of authority by the night watchman.

CONCLUSION

A night watchman appointed under valid ordinance of a fourth class city may have the same powers as those given to the city

Honorable Randolph E. Puchta

marshal, providing that such ordinance grants these powers, and it is not a power confined exclusively to the office of city marshal by statute.

Yours very truly,

John M. Dalton
Attorney General

JBB:ml:MW

JBB:ml:MW

CIRCUIT COURTS:
COURTS:

Senate Bill No. 96, 70th General Assembly, abolished the statutory requirement that certain terms of the Circuit Court of Macon County be convened at LaPlata, and there is no longer any statutory provision for maintaining a courtroom at LaPlata and paying the expenses therefor.

October 23, 1959

FILED

72

Honorable Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Powell:

This is in response to your letter of October 6, 1959, requesting an opinion of this office, which request reads as follows:

"I have been requested by the judges of the Circuit and County Courts of this County to request an opinion of your office respecting the status of the LaPlata, Missouri Circuit Court, which same appears to have been abolished by the recent redistricting enactments."

It is to be noted that in your recent request you stated that you desired an opinion regarding the status of the LaPlata, Missouri Circuit Court. It would appear that this is an incorrect designation since the statutes cited hereinafter did not create the LaPlata, Missouri Circuit Court but instead provided only for the convening of the Macon County Circuit Court at LaPlata at the times specified therein.

In view of our telephone conversation of October 14, 1959, and the language used in your request, this opinion relates to whether Senate Bill No. 96, 70th General Assembly, abolishes the statutory requirements for holding certain terms of the Macon County Circuit Court at LaPlata.

Sections 478.360, 478.363 and 478.367, RSMo 1949, all related to the Circuit Court of Macon County at LaPlata. Section 478.360 provided that three terms of the Circuit Court of Macon County should be held at LaPlata; Sections 478.363 and 478.367 pertained to the change of venue and judgments of the Macon County Circuit Court at LaPlata.

Section 478.080, RSMo 1949, provided that the Second Judicial Circuit should be comprised of Macon and Shelby Counties, and Section 478.210, RSMo 1949, created the terms of court for the Second Judicial Circuit and provided for the terms of court that were to be held at LaPlata.

Honorable Charles A. Powell, Jr.

Senate Bill No. 96, 70th General Assembly, which became effective on August 29, 1959, specifically repealed Sections 478.360, 478.363, 478.367, 478.080 and 478.210, supra. Section 478.177, V.A.M.S., Pamphlet No. 5 (August, 1959) created Judicial Circuit No. 41 which is composed of Macon and Shelby Counties. Section 478.310, V.A.M.S., Pamphlet No. 5 (August, 1959) specifies the terms of court in the 41st Judicial Circuit and reads as follows:

"In the County of Macon, on the first Mondays in May and September and the third Mondays in November and January; in the County of Shelby, on the third Monday in February and the first Mondays in June and October."

Sections 478.360, 478.363 and 478.367, supra, were repealed outright by Senate Bill No. 96 and no further legislation was enacted to provide for the holding of court at LaPlata. Therefore, it must be concluded that there is no longer any statutory requirement that the Macon County Court be convened at LaPlata, and there is no provision for maintaining a courtroom at LaPlata and paying the expenses therefor. It is to be noted that Section 478.310, supra, is silent as to the place where the terms of court for Macon County are to be held.

Article V, Section 14, Constitution of Missouri, 1945, reads as follows:

"The circuit courts shall have jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law. Such courts shall sit at times and places in each county as prescribed by law." (Emphasis ours.)

Section 49.310, RSMo 1949, reads as follows:

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. * * * " (Emphasis ours.)

Honorable Charles A. Powell, Jr.

The established seat of justice for Macon County is the City of Macon.

For your information we are enclosing herewith a copy of an opinion of this office dated January 11, 1954, issued to Honorable James P. Hawkins, Judge, 18th Judicial Circuit, which relates to the duty and authority of the county to designate and provide a suitable place for holding circuit court at the established seat of justice.

CONCLUSION

Therefore, it is the opinion of this department that Senate Bill No. 96, 70th General Assembly, abolished the statutory requirement that certain terms of the Circuit Court of Macon County be convened at LaPlata, and there is no longer any statutory provision for maintaining a courtroom at LaPlata and paying the expenses therefor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH/mlw
Enclosure

PROSECUTING ATTORNEY: We are of the opinion that (1) it is not the duty
MAGISTRATE JUDGE: of the prosecuting attorney to represent a com-
PEACE BOND: plainant in a peace bond proceeding; (2) a magis-
allow time for the securing of witnesses, a jury and procurement of
counsel for defendant; (3) the magistrate court does not have authority
to require a defendant after granting a continuance to require the defend-
ant to post bond or in lieu thereof commit him to jail pending the hearing;
(4) that the defendant may waive trial by jury in a peace bond proceeding.

April 14, 1959

FILED
7/6

Honorable Raymond R. Roberts
Prosecuting Attorney
St. Francois County
Court House
Farmington, Missouri

Dear Mr. Roberts:

We are in receipt of your recent letter in which you ask us
for an official opinion on the following matters:

- "(1) In proceedings upon a complaint filed in the Magistrate Court to compel a recognizance, is it the duty of the Prosecuting Attorney to pursue this matter or is that a matter for the attorney for the individual involved, prior to the actual commission of an offense for which the recognizance would be forfeited?
- (2) May the Magistrate Judge continue this matter over in order to allow time for the securing of witnesses, a jury, the procurement of counsel for the defendant, etc.?
- (3) If so, is it necessary to commit the defendant to jail pending the hearing? or may the Magistrate allow him to post a bond or to go free until the hearing can be had?
- (4) May the six man jury be waived in such a matter and the matter submitted to the Magistrate?"

For the sake of simplicity, we will endeavor to answer each question in chronological order.

Honorable Raymond R. Roberts

Section 542.010, et. seq., RSMo 1949, sets forth the proceedings to be followed by a magistrate upon a complaint being filed that some person has threatened or is about to commit some offense against the complainant or his property.

At first blush, this procedure would appear to be a criminal proceeding. It is found under the heading "criminal procedure" in our Missouri statutes, 1949. Provision is made for the issuance of a warrant and mention is made in Section 542.040, supra, of the defendant being found "guilty."

In the case of *Ex parte Chambers*, 290 S.W. 103, the Springfield Court of Appeals had under consideration the 1919 Missouri statutes relating to peace bonds. Of course, there have been some amendments to our current statutes but we believe this case is applicable in interpreting our present statutes, Section 542.010, et. seq., supra, and we quote from pages 104-105, paragraph [3-6], of the opinion where the Court said:

"These proceedings, to require petitioner to give a peace bond, were commenced in the justice court, affirmed on appeal to the circuit court, and again affirmed on appeal to this court. We are of the opinion, therefore, that the payment of costs in this case is governed by the provisions of section 3757, which simply directs judgment for costs against defendant upon affirmance of the conviction. * * * The costs for which defendant may be liable is one thing, and the manner in which the collection thereof may be enforced is another. The intent of the Legislature to authorize imprisonment for costs in a proceeding not strictly criminal should clearly appear. ***" (Emphasis supplied.)

In view of the *Chambers* case, supra, it is evident that the procedure to procure a peace bond is not "strictly a criminal" proceeding. We, therefore, direct your attention to Section 56.060, RSMo 1949, where we quote, in part, the duties of a prosecuting attorney:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in

Honorable Raymond R. Roberts

their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; ***."

We have been unable to find a Missouri case discussing the particular point raised in your first question. We are of the belief, however, after examining the statutes and the Chambers case, that it is not the duty of the prosecuting attorney under these circumstances to procure a peace bond for a complainant. This appears to us to be the reasonable interpretation of the aforementioned statutes.

In reference to question (2), Section 542.040, supra, reads as follows:

"Upon such person being brought before such magistrate, the magistrate shall summon all witnesses which either party may require, and cause the matters charged in the complaint to be inquired into by a jury of six competent citizens. If the jury find that there is good reason to fear the commission of the offense charged, then they shall render a verdict of guilty against the defendant, and the magistrate thereupon shall require the defendant to enter into a recognizance in such sum, not exceeding one thousand dollars, as he shall direct, with one or more sufficient sureties, conditioned that the defendant will keep the peace toward the people of the state, and particularly toward the complainant, for such time as shall be specified in said recognizance, which shall be not less than three months nor more than one year from the date thereof; and the defendant shall be liable for costs as in other cases of conviction."

Obviously, the above quoted procedure statute on peace bonds is wholly silent on the subject of continuances and no mention of continuances can be found within the statutes pertaining to peace bonds.

Honorable Raymond R. Roberts

We, therefore, direct your attention to Section 517.570, RSMo 1949, which sets forth magistrate court procedure on continuances as follows:

"Magistrate may continue trial to another day.--Upon the return day, if a jury be required or if the magistrate be actually engaged in other official business or in any case when it shall be necessary, the magistrate may continue the trial to another day without the consent of either party. (L. 1945 p. 765 § 81)"

In this regard, see also Section 517.590, RSMo 1949.

We are of the opinion that even though there is no specific authorization under Section 542.010, et. seq., supra, for a continuance, a continuance may be granted under authority of Section 517.570, supra. Our position in this regard seems to us to be reasonable. The defendant should have the right to employ counsel to represent him and the Court may need time to summon a jury. A Court, therefore, should have the power to grant a continuance and we are of the belief that Section 517.570, supra, authorizes such action.

In answer to question (3), we know of no authority authorizing the magistrate after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing.

The procedure authorized under Section 542.010, et. seq., supra, is based on the fact that an offense has "not" been committed but is only "threatened." There is no authority to be found within this section which authorizes posting of a recognizance or commitment to jail in lieu thereof.

In the case of Calhoun vs. Grey, 131 S.W. 478, 1.c. 481, the Court discussed recognizances and accepted the following definition of a recognizance:

" *** It is well understood that a 'recognizance' is an obligation of record, entered into before a court, or other duly authorized officer, conditioned to do some act required by law which is therein specified.

Honorable Raymond R. Roberts

2 Blackstone, Comm. 341; Bouvier's Law Dictionary; Pace v. State, 25 Miss. 54; State v. Walker, 56 N. H. 176, 178. *** "

It is evident from the above definition of a recognizance that a recognizance is given on condition that some "act required by law" will be performed and that said act is specified therein. As stated above, the statutes governing appease bond proceeding does not mention a recognizance shall be given in case of continuances. We have been unable to find any statutory authority wherein a duty is placed on the defendant in case of continuance in a peace bond proceeding. Therefore, we conclude no recognizance or power to commit is authorized in this type of proceeding.

Your last question pertaining to whether the defendant may waive trial by jury is answered, we believe, by Section 510.190, RSMo 1949, which reads, in part, as follows:

"1. The right of trial by jury as declared by the constitution or as given by a statute shall be preserved to the parties inviolate. In particular, any issue as to whether a release, composition, or discharge of plaintiff's original claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless waived.

2. Parties shall be deemed to have waived trial by jury

- (1) By failing to appear at the trial;
- (2) By filing with the clerk written consent in person or by attorney;
- (3) By oral consent in court, entered on the minutes;
- (4) By entering into trial before the court without objection."

Section 542.010, et. seq., supra, does not mention whether a defendant in a peace bond proceeding may waive trial by jury. We

Honorable Raymond R. Roberts

are of the opinion, however, that the defendant may waive trial by jury in view of Section 510.190, supra, which we have quoted above.

CONCLUSION

Under the circumstances mentioned in your letter, we are of the opinion that (1) it is not the duty of the prosecuting attorney to represent a complainant in a peace bond proceeding; (2) a magistrate judge may continue a matter in order to allow time for the securing of witnesses, a jury and a procurement of counsel for the defendant; (3) the magistrate court does not have authority to require a defendant after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing; and (4) that the defendant may waive trial by jury in a peace bond proceeding.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JBA:cm

TAXATION:
COUNTY COURTS:

The county court is empowered by the provisions of Section 137.270, RSMo 1949, to remove tax exempt property from the back tax book upon proper application and at anytime before the taxes are paid. A like power to correct the back tax book is vested in the county court by virtue of the provisions of Section 140.040, RSMo 1949.

April 29, 1959



Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Robertson:

Reference is made to your request for an official opinion, which request reads as follows:

"In 1955 the State Tax Commission agreed with the trustees of the Fitzgibbons Hospital here in Marshall that the hospital property would not be subject to state and county taxes. Prior to that the hospital has been paying taxes and at the time of the agreement their 1954 state and county taxes were assessed and the assessed taxes were transferred to the County Collector's Office of Saline County for collection.

"The question now arises, since the five year period is rapidly approaching for the sale of real estate for delinquent taxes, as to what disposition is to be made of the 1954 taxes. We will appreciate greatly if you will inform us if the Saline County Court can abate these 1954 taxes that were assessed to the Fitzgibbons Hospital prior to the decision of the Tax Commission that the Fitzgibbons Hospital did not have to pay state and county taxes."

First, for the purpose of this opinion, we will assume that the taxes to which you refer have been extended in the back tax book.

Your inquiry involves the authority of the county court to "abate" real estate taxes appearing on the back tax book. More

Honorable Marion Robertson

specifically, the question would appear to be whether the county court has the authority to relieve the proper officials from the collection of back taxes where the property upon which the taxes were imposed for the year in question was tax exempt property.

We first invite your attention to the provisions of Section 137.270, RSMo 1949, which provides as follows:

"The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes. Where any lot of land or any portion thereof, has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

Said section permits the county court to hear and determine, upon application, properly supported by affidavit, allegations of "erroneous assessments" at any term of court before the taxes are paid. This section specifically provides that valuations placed on property by the assessor or the board of equalization shall not be deemed to be "erroneous assessments." This office, in an opinion to Hilary A. Bush, under date of August 12, 1946, a copy of which is enclosed herewith, held that in view of the latter noted provision, a mere error of judgment in the valuation of property by the assessor or county board of equalization could not be considered an "erroneous assessment" under Section 137.-270, RSMo 1949.

What, then, did the Legislature intend by the use of the term "erroneous assessment"?

In the case of Clay County v. Brown Lumber Co., 90 Ark. 413, 119 S.W. 251, the Supreme Court of Arkansas defined the term "erroneous assessment" as follows:

Honorable Marion Robertson

"* * * the term 'erroneous assessment,' as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Dig. § 7180 [Crawford & Moses' Digest, section 10180] give the owner a remedy for a refunding of such taxes thus erroneously paid; but a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property. * **"

See also Cooley, Taxation, 3rd Ed., Vol. 3, Sec. 1259, p. 1205, and the cases of Ritchie Grocer Co. v. City of Texarkana, 182 Ark. 137, 30 S.W.2d 213; Flournoy v. First National Bank of Shreveport, 197 La. 1067, 3 S.2d 244; In re Blatt, 41 N. Mex. 269, 67 P.2d 293; and Home Owners Loan Corp. v. Polk County, 231 Ia. 661, 1 N.W. 742, all adopting a similar definition.

It is our opinion that the foregoing definition is correct and proper and is in complete accord with the context of Section 137.270, RSMo 1949.

We are, therefore, of the opinion that if the property to which you refer was tax exempt property, the assessment thereof for the year in question constitutes a deviation from the law, was jurisdictional in nature and rendered the assessment invalid. Thus, the same could be corrected by the county court as an "erroneous assessment" under Section 137.270, RSMo 1949, upon proper application at anytime before the taxes are paid.

We further invite your attention to the provisions of Section 140.040 and 140.140, RSMo 1949. Section 140.040 provides as follows:

"At the term of the county court at which the several delinquent lists are required by law to be returned and certified, the said court shall examine and compare the list of lands and town lots on which the

Honorable Marion Robertson

taxes remain due and unpaid; and if any such lands or town lots have been assessed more than once, or if any of said lands, or town lots are not subject to taxation, or if the legal subdivision be incorrectly described, in all such cases the said court shall correct such error by the best means in their power, and cause the list so corrected to be certified and filed in the office of the clerk of the county court; and shall also cause the amount of the state, county and municipal taxes to be entered on record, and the amount of the state taxes to be certified to the director of revenue, and amount of municipal taxes to be certified in St. Louis city to the mayor of the city of St. Louis, to the credit of said collector."

Section 140.140 reads:

"The collector shall make diligent endeavor to collect all taxes upon said back tax book, and whenever he finds that any taxes therein have been paid, he shall report that fact to the county court, or other proper officer, giving the name of the officer or person to whom such taxes were paid; and he shall also report to the court, or other proper officer, all cases of double assessment or other errors, and thereupon the court, or other proper officer, shall cause the necessary action to be taken and entries to be made."

The latter section authorizes the county court or other proper official to take the necessary action and to make necessary entries in cases involving "errors" in assessments contained in the back tax book which are reported by the collector. While Section 140.140 does not specify what shall be deemed "other errors," we believe that reference to Section 140.040, supra, indicates that lands not subject to taxation would certainly be an error for it is therein provided that the county court shall correct "errors" appearing on the delinquent list such as "lands, or town lots not subject to taxation." We believe that it is clear that the county court could have removed the property to which you refer (assuming the same to have been tax exempt property) from the delinquent land list in the year the list was returned and examined by the county court. After this list has been filed and the back tax book made up, then the error would have to be and could be,

Honorable Marion Robertson

we believe, corrected by the county court under the authority of Section 140.140, following the provisions for correction outlined in said section and Section 140.040.

We wish to make it clear that we are not undertaking in this opinion to say that the property to which you refer was in truth and in fact tax exempt property for the year in question. The mere fact that the State Tax Commission upon appeal found the property to be tax exempt in one year would not be conclusive upon the question as to whether the property was tax exempt in a preceding year. In other words, property such as a hospital could be, because of its operation, tax exempt one year and, because of a difference in actual operation, not be considered tax exempt for another year. We are enclosing herewith a copy of an opinion to C. M. Hulen, Jr. Prosecuting Attorney of Randolph County, under date of February 12, 1959, which opinion emphasizes the proposition that the actual operation enters into any determination as to whether or not a hospital is a charitable institution and therefore entitled to tax exemption.

CONCLUSION

Therefore, it is the opinion of this office that the county court is empowered by the provisions of Section 137.270, RSMo 1949, to remove tax exempt property from the back tax book upon proper application and at anytime before the taxes are paid.

We are further of the opinion that a like power to correct the back tax book is vested in the county court by virtue of the provisions of Section 140.040, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

Enclosures

TAXATION: Senate Bill No. 179 adopted by the 70th General Assembly relating to the assessment and taxation of the flight equipment of airline companies does not govern the manner, method, and procedure for the assessment of such flight equipment of said companies for the year 1959.

August 11, 1959



Mr. James M. Robertson, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion, which request reads as follows:

"The Seventieth General Assembly of Missouri, while in session, enacted Senate Bill No. 179 providing for the taxation of the flight equipment of Airline Companies. The Tax Commission is given the duty of assessing such property and distributing the valuation to the appropriate taxing jurisdictions. The Governor has signed the bill and it will become law during the year 1959.

"Request is hereby made for an opinion as to whether or not the flight equipment of Airline Companies should be assessed and taxed under the provisions of Senate Bill No. 179 for the year 1959."

Senate Bill No. 179 adopted by the Seventieth General Assembly, to which you refer, establishes a scheme for the valuation and taxation of the flight equipment of airline companies operating in this state. Without going into detail it provides for the aggregate valuation for tax purposes of the flight equipment of airline companies operating within this state by the State Tax Commission and an apportioning of these values by said Commission under a prescribed formula to the various enumerated taxing authorities. Thereafter, taxes are to be levied on all flight equipment covered by said bill in the manner provided for the taxation of railroad property. See Chapter 151, V.A.M.S. relating to the taxation of railroad property.

Other pertinent parts of said bill will be discussed herein as the same may become necessary to a proper determination of the question presented.

Mr. James M. Robertson

Senate Bill No. 179, which has already been approved by the Governor, does not contain an emergency clause and therefore will not become effective until August 29, 1959, which date is ninety days after the close of the legislative session.

You inquire whether or not the flight equipment of airline companies should be assessed and taxed under the provisions of said bill for the year 1959. Suffice it to say that said bill does not specifically provide whether or not said property is to be assessed under its provisions for the year 1959.

We are faced at the outset with the question as to whether said bill would, if held applicable to the assessment and taxation of flight equipment for the year 1959, contravene that portion of Article I, Section 13, of the Missouri Constitution, prohibiting the enactment of laws retrospective in operation. Said constitutional provision provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

In the case of Reed vs. Swan, 133 Mo. 100, 108; 34 S.W. 483, 484, the Supreme Court of Missouri quoted with approval the following definition of a retrospective law:

"Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past must be deemed retrospective."

See also Smith vs. Dirckx, 223 S.W. 104 at 106; Lucas vs. Murphy, 156 S.W. 2d 686, 690; and Barbieri vs. Morris, 315 S.W. 2d 711, 714, wherein the same definition was adopted by the Supreme Court.

The Supreme Court of this state has exhibited a distinct tendency to construe taxing statutes so as to render their operation prospective only. In the case of Smith vs. Dirckx, 223 S.W. 104, it was held that a 1919 amendment to the state income tax laws which was approved May 6, 1919, and which increased the rate from one-half of one per cent to 1 1/2 per cent was violative of Article I, Section 13, insofar as it applied to net income received prior to the effective date of the amendment. See also State ex rel. vs. Southwestern Bell Telephone Company, 292 S.W. 1037, relating to corporate income taxes.

Mr. James M. Robertson

In the case of First National Bank of St. Joseph vs. Buchanan County, 356 Mo. 1204, 205 S.W. 2d 726, the court held that the Bank Tax Act of 1946 which became operative July 1, 1946, and which operates as a substitute tax for the personal property tax was retrospective in its operation insofar as it purported to apply to the whole year 1946 and could not be effective "in any event" prior to the effective date of the act.

Lastly in the case of In re Armistead, 245 S.W. 2d 145, 362 Mo. 960, the court held that an assessment for the year 1947 under the Intangible Personal Property Tax Act, which act became effective July 1, 1946, and which assessment was based upon the yield for the preceding year, violated Article I, Section 13, insofar as it took into consideration yield prior to the effective date of the act.

Prior to the effective date of Senate Bill No. 179, the property encompassed by said bill was subject to assessment by the local authorities as other local property is assessed.

It is of course fundamental that the local assessment of property must be predicated upon presence within the taxing jurisdiction on the assessment date. Probably under the new act some property would be included in the aggregate valuation fixed and determined by the State Tax Commission for tax purposes which would have escaped taxation under the law existing prior to the effective date of Senate Bill No. 179 because located outside the taxing jurisdiction on the assessment date. Further where under the existing law, an airline company would report their property to the local assessing officials, they are required under the provisions of Senate Bill No. 179 to report their flight equipment to the State Tax Commission.

We note also that Senate Bill No. 179 provides that the Commission shall make an apportionment to a municipality which owns and operates an airport outside of its corporate limits.

The foregoing matters considered, we are of the opinion that Senate Bill No. 179 does impose new duties and create new obligations and if construed to be applicable for the year 1959, it would be in violation of the constitutional prohibition against the enactment of retrospective laws.

We here note Section 2 of said bill which requires the president or other authorized official of an airline company operating in air commerce in this state to file "each and every year" on or before the first day of May, a report containing certain specified information with the State Tax Commission. It is principally and primarily upon the information contained in this report that the assessment is made. Since the bill will not become effective until August 29, 1959, it would, of course, be impossible to comply with the foregoing provisions. Considered

Mr. James M. Robertson

as a whole, we are of the opinion that it was not the intention of the General Assembly in enacting said bill that it should govern the assessment and taxation of the flight equipment of airline companies for the year 1959.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that Senate Bill No. 179 adopted by the Seventieth General Assembly relating to the assessment and taxation of the flight equipment of airline companies does not govern the manner, method, and procedure for the assessment of such flight equipment of said companies for the year 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

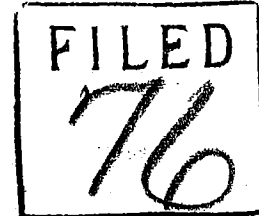
Very truly yours,

John M. Dalton
Attorney General

DDG:ga

SCHOOLS: School district may appear before State
SCHOOL DISTRICTS: Tax Commission at hearing on appeal of
TAXATION: assessment and may employ expert wit-
STATE TAX COMMISSION: nesses for such purpose.

December 15, 1959



Honorable Raymond R. Roberts
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

This is in response to your request for opinion dated November 24, 1959, which reads as follows:

"Request is hereby made for an opinion concerning the following questions:

1. Is it proper for a school board affected by values therein considered to intervene as a party and interest in an appeal from a county Board of Equalization to the State Tax Commission concerning intra-county valuations on real estate?
2. If it is proper for an interested school district to so intervene, is it proper for the school board to make necessary expenditures for the use of expert witnesses?"

The procedure for appealing from a decision of the county board of equalization is set forth in Chapter 138, RSMo. Particularly, Section 138.430(2), RSMo 1949, provides:

"2. Every owner of real property or tangible personal property and every merchant and manufacturer shall have the right of appeal from the local boards of equalization under rules prescribed by the state tax commission.

Honorable Raymond R. Roberts

Said commission shall investigate all such appeals and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious."

Section 138.470, RSMo, C.S. 1957, in providing for the hearing before the Commission, also provides that "all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing."

A school district being a body politic and a public corporation, is a "person" within the meaning of the statutes. Section 1.020(7), RSMo, C.S. 1957; School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 SW2d 909; Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 SW2d 930, 933. It certainly is "liable to be affected" by review of assessments because the review will determine whether the school district will receive more or less revenue. See School Dist. No. 24 of St. Louis County v. Neaf et al., 347 Mo. 700, 148 SW2d 554. Consequently, we are of the opinion that a school district may appear and be heard in an appeal to the State Tax Commission under Section 138.430, RSMo 1949.

School districts are creatures of statute and have such powers as are expressly conferred upon them by statute, but they also have such power as arises by necessary implication from those expressly conferred. State v. Kessler, 136 Mo. App. 236, 117 SW 85; Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 SW 43; 56 C.J., School and School Districts, page 193, Section 46, page 294, Section 152, page 331, Section 202. By statute, school districts, expressly, have been granted the power to sue and be sued. Section 165.263, RSMo 1949.

Although we have found no Missouri cases squarely on the point, the law generally is set out in 79 C.J.S., School and School Districts, page 316, Section 428(b):

"The capacity to sue or be sued carries with it all powers that are ordinarily incident to the prosecution or defense of a suit at law or in equity * * *."

It is apparently common practice for the taxpayer to employ expert witnesses in actions of this nature, and we perceive no reason why the political subdivision appearing before the Tax Commission for the purpose of protecting its revenue should be

Honorable Raymond R. Roberts

in any different position. If the employment of an expert witness is reasonably necessary to the presentation of the school district's case before the Commission, we are of the opinion that it may do so.

CONCLUSION

It is the opinion of this office that a school district liable to be affected by review of a tax assessment may appear before the State Tax Commission and be heard thereon. We are of the further opinion that if it is reasonably necessary for the presentation of the school district's case at such hearing, the school district may employ and present the testimony of expert witnesses.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

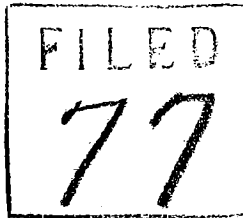
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

PREVAILING WAGE LAW:

A construction project in the state of Missouri by the federal government does not come within the purview of the Prevailing Wage Law.



January 6, 1959

Mr. J. R. Rose, Chairman
Industrial Commission of Missouri
Department of Labor and
Industrial Relations
State Office Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Under the new Prevailing Wage Law of 1957, being Sections 290.010 to 290.310, the Industrial Commission is charged with making wage determinations on all needed crafts in the construction of public works.

"The purpose of this letter is to inquire from your office as to whether it is necessary for the Industrial Commission to require applications for wage determinations on federal projects, paid for by the Federal Government, when constructed in the State of Missouri. It is our information that such wage determinations are made by the Federal Department of Labor in Washington. It is our thought that perhaps this Missouri Industrial Commission has no duty or jurisdiction in that sort of a situation, but will be glad to have the advice of your office."

Subsequent to writing the above opinion request, you have, in response to our inquiry regarding the meaning of the term "federal projects," used by you, informed us that the meaning which you attach to those words is any unit of construction built wholly by federal funds under federal direction for

Mr. J. R. Rose

federal purposes, such as a post office, or a veterans' hospital, or a federal court building, or any similar construction.

Chapter 290, MoRS, Cum. Supp. 1957, which sets forth the so-called Prevailing Wage Law, declares the policy and purpose of the law in Section 290.220, which reads:

"It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work."

It will be noted from the above that projects which come within the purview of this law are those in which a public body is engaged in public works. The same policy is declared in Section 290.230, and indeed throughout this chapter. Therefore, any construction work not done by a "public body" does not come within the Prevailing Wage Law. Numbered paragraph 6 of Section 290.210 defines "public body" to mean, "the state of Missouri or any officer, board or commission of the state, or other political subdivision." Since the federal government does not come within the definition of "public body," it would seem obvious that construction work done by the federal government would not come within the purview of the Prevailing Wage Law.

Other reasons might be adduced sustaining the above conclusion, but, in view of the fact that the above seems to us to be conclusive, we see no reason for so doing.

CONCLUSION

It is the opinion of this department that a construction project in the state of Missouri by the federal government does not come within the purview of the Prevailing Wage Law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

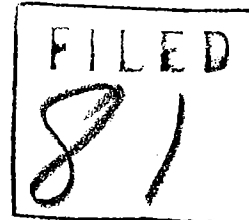
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TRAINING SCHOOLS: Juvenile court loses jurisdiction of child when child is committed to, and received by, State Board of Training Schools. Jurisdiction revested in the committing court only upon application of State Board of Training School for order relieving it of custody.

JUVENILE COURT:

JUVENILE CODE:

April 20, 1959



Mr. W. E. Sears
Director
Board of Training Schools
Capitol Building
Jefferson City, Missouri

Dear Mr. Sears:

This is in response to your request for opinion dated March 16, 1959, which reads as follows:

"The State Board of Training Schools at its official March meeting requested I solicit advice from your office concerning a problem which I will relate and at the same time indicate some of the various statutes that have either direct or indirect bearing upon the total problem.

"The narrative of the problem is as follows:

"On or about the first of the year two boys, within the state of Missouri, made arrangements with two girls, also residents of this state, whereby the four in a stolen car spent a period of time in adjoining states and during this journey no doubt committed several additional burglaries, including a cabin in one of the southern counties in this state. As would be expected, the girls were rather promiscuous in their behavior with these two boys since it was their belief they were married in an adjoining state but such fact has not been verified by official record. Accordingly, there were indications of possible pregnancy at the time the two

Mr. W. E. Sears

girls were committed by the juvenile court to the State Training School in Chillicothe, Missouri.

"Following our usual procedure, the girls were given an entrance physical examination and after sufficient time, it was determined one of the girls was pregnant. In as much as this girl required care and attention which the state school was not equipped to provide, Section 219.220 RSMo Volume I was utilized in asking that the girl be returned to the original court for proper disposition.

"The court, acting in accordance with the request on one of the girls, indicated by his court order that both girls, the pregnant one and the one that was not pregnant, who were committed for identical reasons to the training school, should be released. A court order was prepared in that direction.

"In as much as the Training School Board had not requested release of the nonpregnant girl, the Board at its last official meeting, again considered the following statutes in relation to their responsibility to the total training school program and considered Section 219.020, 219.140 and 219.250. In the latter section, the Board has for years established a policy that boys and girls committed to its care, must by their actions, behavior and attitude, earn their own eligibility for release from the training school to return to community living under supervision. The appropriate Classification Committee of the training school is delegated the authority to determine when a child is eligible for parole or placement consideration. In so doing care has been taken to treat all boys and girls alike so there might be uniform practice in dealing with children committed to the Board's attention. In this instance, the Board reviewed Sections 211.191, 211.251, 211.261 and 211.041 of the Missouri Revised Statutes, Cumulative Supplement 1957. In the latter section, the Board is of the opinion, unless directed otherwise, that the

Mr. W. E. Sears

committing court loses jurisdiction of a child when said child is committed to and received by the State Board of Training Schools unless Section 219.220 RSMo, Volume I, is utilized.

"The Training School Board, in light of the numerous statutes referred to and their desire to act in accordance with these and other statutes which have a bearing upon children committed to the Board's care, desire advice as to whether the non-pregnant girl should be released on the basis of the existing court order that is coupled with the pregnant girl. The Board has a policy that has been used most infrequently to the effect that if the original court outlines in a court order valid reasons for the release of a child, on the basis of the appearance of new evidence not considered at the original hearing, or other like situations, the child may be returned to the original court for further consideration. There is a question, however, in the case at hand as to whether the release of the non-pregnant girl should be effected since she was originally committed for reformation because of offenses committed. We are, as would be expected, concerned with the total responsibility the Board of Training Schools may or may not have in its dealing with children committed to its care and do not want to disturb the existing regulations pertaining to a child earning their eligibility for release from the institution through their own efforts and proper behavior and conduct.

"Your assistance in advising the State Board of Training Schools in this particular matter relating to the Board's jurisdiction will be greatly appreciated."

The following sections of the statutes are pertinent to your inquiry:

Mr. W. E. Sears

Section 211.041, RSMo, Cum. Supp. 1957.
"When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of this chapter in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of this chapter until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools."

Section 211.191, RSMo, Cum. Supp. 1957.
"Nothing in this chapter shall be construed to repeal any part of the law relating to the state training school for girls or the state training school for boys; and in all commitments to either of these institutions the law in reference to them shall govern."

Section 211.251, RSMo, Cum. Supp. 1957.
"1. A decree of the juvenile court made under the provisions of section 211.181 may be modified at any time on the court's own motion.

"2. The parent, guardian, legal custodian, spouse, relative or next friend of a child committed to the custody of an institution or agency may, at any time, petition the court for a modification of the order of custody. The court may deny the petition without hearing or may, in its discretion, conduct a hearing upon the issues raised and may make any orders relative to the issues as it deems proper.

"3. The authority of the juvenile court to modify a decree is subject to the provisions of chapter 219, RSMo."

Section 219.220, RSMo 1949.

"The board may, at any time, if it finds that any child committed to it is in need

Mr. W. E. Sears

of care or treatment other than that which it is equipped to provide, apply to the court which committed such child for an order relieving it of custody of such child. Upon the making of such order the court shall be vested with full power to make such disposition of the child as is authorized by law."

From a reading of Chapters 211 and 219 of the statutes, and particularly those portions set out above, it is apparent that the juvenile court loses jurisdiction of a child when a child is committed to, and received by, the State Board of Training Schools. After a child has been committed to, and received by, the State Board of Training Schools, the only instance in which the law makes provision for revesting jurisdiction in the juvenile court is when application is made by the State Board of Training Schools under Section 219.220, supra.

Since the Board did not make application to the committing court for an order relieving it of custody of the nonpregnant girl, the court had no jurisdiction over such girl. Consequently, the Board should not release her on the basis of the court's order.

CONCLUSION

It is the opinion of this office that the juvenile court loses jurisdiction over a child when such child is committed to, and received by, the State Board of Training Schools and that the committing court may be revested with jurisdiction only upon application by the State Board of Training Schools for an order relieving it of custody of such child under Section 219.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

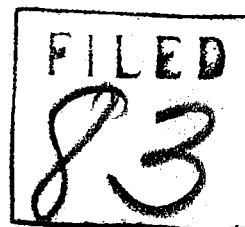
JOHN M. DALTON
Attorney General

JWI:ml

PUBLIC INFORMATION:
COUNTY WELFARE AGENTS:
CONFIDENTIAL RECORDS:

A director of a county welfare office is not authorized to refuse to testify in court, whether a juvenile hearing (closed to the public) or to a regular court hearing (open to the public), whether a person is receiving aid from the Division of Welfare, or as to the amount of said aid.

April 6, 1959



Honorable Charles H. Sloan
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Mr. Sloan:

This is in response to your letter of January 28, 1959, in which you request an opinion from this office as follows:

"I respectfully request an opinion from your office on the following question, to-wit: Can a Director of a County Welfare Office refuse to testify in Court whether a person is receiving aid from the Division of Welfare and as to the amount of said aid?

"Please answer the foregoing question with respect to a Juvenile Hearing (closed to the public) and to a regular Court Hearing (open to the public)."

Section 208.120, paragraphs one and two, of the Revised Statutes of Missouri, Cum. Supp. 1957, state:

"1. For the protection of applicants and recipients, all officers and employees of the state of Missouri are prohibited, except as hereinafter provided, from disclosing any information obtained by them in the discharge of their official duties relative to the identity of applicants for or recipients of benefits or the contents of any records, files, papers and communications, except in proceedings or investigations where the eligibility of an applicant to receive benefits, or the amount

Honorable Charles H. Sloan

received or to be received by any recipient, is called into question, or for purposes directly connected with the administration of old age assistance, aid to dependent children, and aid to the permanently and totally disabled. In any judicial proceedings, except such proceedings as are directly concerned with the administration of these programs, such information obtained in the discharge of official duties relative to the identity of applicants for or recipients of benefits, and records, files, papers, communications and their contents shall be confidential and not admissible in evidence.

"2. The division of welfare shall in each county welfare office maintain monthly a report showing the name and address of all recipients certified by such county welfare office to receive old age assistance, aid to dependent children and aid to the permanently and totally disabled benefits, together with the amount paid to each recipient during the preceding month, and each such report and the information contained therein shall be open to public inspection at all times during the regular office hours of the county welfare office; provided, however, that all information regarding applicants or recipients other than names, addresses and amounts of grants shall be considered as confidential."

You will observe that the last sentence of paragraph one of Section 208.120 states that the information obtained in the discharge of official duties relative to the identity of applicants for or recipients of benefits, etc., shall be confidential and not admissible in evidence. Were this the only paragraph involved in this section it would not be difficult in finding that it is the intention of this statute to keep information of that nature from the courts. However, it is to be noted that paragraph two of Section 208.120 provides that a county welfare office is to maintain as a public record, accessible to everyone, the names and addresses of recipients as well as the amount received in specified relief programs.

Peculiarly enough, these sections were enacted in their

Honorable Charles H. Sloan

present form in 1953, containing both the provision relative to judicial proceedings, and the further provision that the names of recipients and the amounts they received be open to public inspection. It would appear then that if the section were interpreted literally it would mean that the names of the recipients and the amounts they received would be open to everyone except the courts of Missouri. This would obviously be a frustration of justice.

It is our belief that in determining the intention of the legislature as expressed in the statutes, we must consider those sections of the statute together. One without the other might tend to lead to a different and anomalous procedure than when we consider the two. Since paragraph two provides that the Division of Welfare in each county welfare office shall maintain a report showing the name and address of all recipients, together with the amount paid to each recipient, such report and the information contained therein being open to public inspection at all times during the regular office hours of the county welfare office, it is our opinion that this same information was not intended to be kept from the courts of Missouri by the provisions of paragraph one of Section 208.120.

It is our opinion that paragraph one should not be construed to prohibit testimony in any type of judicial proceeding, such as a juvenile hearing or a regular court hearing concerning matters which are made public information under the provisions of paragraph two of Section 208.120, RSMo Cum. Supp. 1957.

CONCLUSION

It is the opinion of this office that a director of a county welfare office is not authorized to refuse to testify in court, whether a juvenile hearing (closed to the public) or to a regular court hearing (open to the public), whether a person is receiving aid from the Division of Welfare, or as to the amount of said aid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

SPECIAL ROAD DISTRICTS: A special road district, which
CITY OR TOWN ROAD maintains its own rock quarry,
DISTRICTS: may sell the surplus product
QUARRIES: thereof to other governmental
bodies.

June 23, 1959

Honorable Ike Skelton, Jr.
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Mr. Skelton:

This is in reply to your recent request that we submit an opinion as to whether a special road district may quarry crushed rock for its own use and sell some of the production of that quarry to other governmental bodies.

Your inquiry reads as follows:

"I have been asked by our County Court to request of you an opinion covering the following question: Can a special road district quarry and crush rock and sell it to another road district, a county, municipality, or another political subdivision of the County or State?

"If you could give us an official opinion upon this matter, we would more than appreciate it."

A special city or town road district may maintain a quarry to process rock for its use on roads within the district. This office has previously made a determination that it may do so and, after having reviewed this opinion at some length, we are of the view that it correctly expresses the present law. Accordingly, we are enclosing for your information our opinion of June 15, 1943, to the Honorable Phil H. Cook, which determined that a special road district might maintain a quarry. There remains to be decided, however, the question of whether a special road district may make sales of crushed

Honorable Ike Skelton, Jr.

stone from its quarry to other governmental bodies.

The question of maintaining a quarry and selling the product thereof to other governmental bodies has been recently passed upon in the case of counties by our Supreme Court, in *Everett v. County of Clinton*, 282 S. W. 2d 30. It is held in that case that counties could dispose of surplus products of a county-owned quarry to other governmental bodies, however, sale to other than governmental bodies was enjoined on the grounds of the county engaging in a commercial enterprise. The Court, per Dalton, J., at l.c. 39, stated the rule as follows:

"* * * The sale of crushed rock to the special road districts of the county for use upon the public roads of the county lying within the boundaries of the respective districts was for a public purpose, to wit, the improvement of the public roads of the county. There is no suggestion in this record that any private purpose was being served in the sale of crushed stone to the several special road districts. Clearly, the special road districts had authority to buy crushed stone.

* * * * *

"Sales of crushed rock by the county to private individuals for private purposes as shown by this record were properly enjoined."

Our laws pertaining to city and town road districts, found in Chapter 233, would also seem to contemplate sale of the surplus product of a special road district's quarry to other governmental bodies. First, the duties and powers granted to the board by Section 233.070, RSMo Cum. Supp. 1957, indicate that the board is to have exclusive control of materials to effectuate its work and impose duties of road maintenance in the following language:

"(1) Have sole, exclusive and entire

Honorable Ike Skelton, Jr.

control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers;

"(2) At all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensation, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work, or the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe; and

"(3) Have authority to enter into contracts with any city, town or village within its district relating to the improvement of the streets, roads or highways, or any bridge thereon, located in the city, town or village."

Secondly, by Section 233.075, RSMo 1949, special road districts are given extensive powers over their purchase of materials for road purposes. Again, we quote the applicable section in full as follows:

"Such board may buy all material which may be used, directly or indirectly, in constructing, improving or repairing any public highway or bridge in its district, and is authorized to do and perform all acts within its district for which any authority is given to road overseers under the general road law of this state."

Honorable Ike Skelton, Jr.

Thirdly, the board has power to sell its property by Section 233.090, RSMo 1949, as follows:

"Said board shall sell any property of such district, on such terms as it may deem proper, when same can no longer be profitably used for road work."

So we have seen by these provisions that the board has a duty to maintain a district's roads and, to effectuate the purposes, has been given powers to contract with other governmental bodies, the power to purchase needful materials and the power to sell property of the district not needed. That governmental bodies have the right to dispose of surplus product from one of their governmental enterprises has long been recognized. The rule is stated in 63 C.J.S., Municipal Corporations, Section 967, page 516, which we quote in part, as follows:

"A municipal corporation holding or acquiring property for a special purpose ordinarily lacks power to sell or otherwise dispose of such property while needed for such special purpose, except as may be prescribed by law; but ordinarily it is accorded power to sell surplus property not required for the special purpose or property which it has become impossible to use for such special purposes. * * * "

CONCLUSION

Therefore, it is the conclusion of this office that a special road district may maintain a quarry for the purpose of acquiring materials needed for the maintenance of its roads, and may sell the surplus products to other

Honorable Ike Skelton, Jr.

governmental bodies. It may not sell surplus stone to purchasers other than governmental bodies.

The foregoing opinion, which I hereby approve, was prepared by my assistant J. B. Buxton.

Very truly yours,

John M. Dalton
Attorney General

JMB:lc

1 enclosure

MOTOR VEHICLES:
"GO-CARTS":
LICENSES:
DEPARTMENT OF REVENUE:

"Go-carts" are "motor vehicles" within the Missouri statutes regulating the licensing and driving of motor vehicles if they are driven upon the highway. As motor vehicles, "go-carts" must meet the statutory lighting and equipment regulations for motor vehicles if they are to be driven upon the highways

September 10, 1959



Honorable Charles H. Sloan
Prosecuting Attorney
Ray County, Missouri
Richmond, Missouri

Dear Sir:

This is in reply to your recent inquiry requesting an opinion as to whether the so-called "go-carts", operating on the public highways of this State are required to be registered with the Department of Revenue as motor vehicles and whether the Department of Revenue could refuse to license the said "go-cart" if they were not equipped with such things as lights, horns and proper brakes. Your inquiry reads as follows:

"There are a number of small vehicles, commonly referred to as 'Go-Carts', which are being operated in this county on the public streets, roads and highways. Their operation has created a traffic safety problem.

Please render an opinion whether the operation of a so-called 'Go-Cart' on the public roads and highways of this State requires that they be properly registered with the Department of Revenue. Also, if such is a requirement, can the said Department of Revenue refuse to license them if in their opinion the 'Go-Carts' are not properly equipped with such things as lights, horns and proper brakes?"

After an extended study, we were unable to find a case containing a judicial definition of the so-called "go-cart". Accordingly, we wrote to you requesting that a comprehensive definition of a "go-cart" be submitted by you and that you inform us as to whether such vehicles were actively being used on the highways in your area. The comprehensive definition of a "go-cart" set forth in your letter of August 15, 1959, will be used as a basis for our opinion in answering the questions posed by your request. Accordingly, your definition reads:

Honorable Charles H. Sloan

"A small, vehicular machine, measuring 48 inches long, 32 inches wide and having 2 1/2 inches clearance from the ground, which has a chain drive powered by a gasoline motor having from 2 1/2 to 5 horse power and which operates upon inflated tires that are upon 12.3 inches rear wheels and 10 inches front wheels."

Turning now to the Missouri statutes covering the registration of motor vehicles as found in Chapter 301, RSMo., we shall first look to see whether the above described "go-cart" is a motor vehicle within the meaning of this chapter. We quote, in part, the definition statute, Section 301.010, RSMo. Cum. Supp. 1957:

"As used in chapter 301 and sections 304.010 to 304.040 and 304.120 to 304.570, RSMo, the following terms mean:

* * * * *

15. 'Motor vehicle,' any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;"

These vehicles might, in turn, fall within two other provisions of this statute, that denominated as "reconstructed motor vehicle" or a "specially constructed motor vehicle". However, since these vehicles are by their statutory definition merely particular types of motor vehicles, we shall not attempt to confine our inquiry to particular types of motor vehicles.

It is evident from reading the comprehensive definition of "motor vehicle" as found in our statutes ("any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;") that a "go-cart" is a motor vehicle within the statutory definition. By the definition given, it is "self-propelled" but it does not operate on tracks and it is not a farm tractor.

A farm tractor is also defined by Section 301.010, RSMo. Cum. Supp. 1957, as "a tractor used exclusively for agricultural purposes" and a tractor is defined as "any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently;"

Honorable Charles H. Sloan

Clearly, a "go-cart" does not meet the statutory exception set forth in the definition of a motor vehicle.

Section 301.020, RSMo. Cum. Supp. 1957, sets forth the registration and licensing requirements for motor vehicles. Again, we quote in part:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing:

(1) A brief description of the motor vehicle to be registered, including the name of the manufacturer, the manufacturer's or other identifying number, and character, and amount of motive power, stated in figures of horsepower;

(2) The name, residence and business address of the owner of such motor vehicle;

* * * * *

(4) If such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the director of revenue such additional information as he shall require." (Emphasis ours.)

Again, the statutory wording is clear that if the so-called "go-cart" were used on the highways of this State it would have to be registered and licensed as any other motor vehicle.

The definition quoted in Section 301.010, RSMo. Cum. Supp., supra, is in substance the same as that found in Chapter 302, RSMo. (Sec. 302.010, RSMo.) defining motor vehicles for purposes of licensing drivers or motor vehicle operators. By the terms of Section 302.020, RSMo., an operator of a motor vehicle of the

Honorable Charles H. Sloan

"go-cart" type would also have to have an operator's license to drive such a vehicle upon the highways of this State.

Statutory equipment requirements for motor vehicles are found in Chapter 304, RSMo. By the terms of Section 304.500, RSMo., it is the duty of the Director of Revenue not to license motor vehicles without safety glass. Likewise, by the terms of Section 304.560, RSMo., it is required that motor vehicles be provided with other necessary equipment:

"(1) Signaling devices: Every motor vehicle shall be equipped with a horn, directed forward, or whistle in good working order, capable of emitting a sound adequate in quantity and volume to give warning of the approach of such vehicle to other users of the highway and to pedestrians. Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise, and no other sound-producing signaling device shall be used at any time.

(2) Muffler cutouts: Muffler cutouts shall not be used and no vehicle shall be driven in such manner or condition that excessive and unnecessary noises shall be made by its machinery, motor, signaling device, or other parts, or by any improperly loaded cargo. The motors of all motor vehicles shall be fitted with properly attached mufflers of such capacity or construction as to quiet the maximum possible exhaust noise as completely as is done in modern gas engine passenger motor vehicles. Any cutout or opening in the exhaust pipe between the motor and the muffler on any motor vehicle shall be completely closed and disconnected from its operating lever, and shall be so arranged that it cannot automatically open, or be opened or operated while such vehicle is in motion.

(3) Brakes: All motor vehicles, except motorcycles, shall be provided at all times with two sets of adequate brakes, kept in good

Honorable Charles H. Sloan

working order, and motorcycles shall be provided with one set of adequate brakes kept in good working order.

(4) Mirrors: All motor vehicles which are so constructed or loaded that the operator cannot see the road behind such vehicle by looking back or around the side of such vehicle shall be equipped with a mirror so adjusted as to reveal the road behind and be visible from the operator's seat.

(5) Projections on vehicles: All vehicles carrying poles or other objects, which project more than five feet from the rear of such vehicle, shall, during the period when lights are required by this chapter, carry a red light at or near the rear end of the pole or other object so projecting. At other times a red flag or cloth, not less than sixteen inches square, shall be displayed at the end of such projection.

(6) Tow lines: When one vehicle is being towed by another they shall be coupled by a line so that the two vehicles will be separated by not more than fifteen feet and there shall be displayed on the tow line a white cloth or paper so that the same will be clearly visible to other users of the highway. During the time lights are required by this chapter the required lights shall be displayed by both vehicles."

Other than these equipment requirements, there is no other specific equipment requirement. Under the lighting requirement as found in Chapter 304, the Director of Revenue is authorized to approve of and make rules relating to lighting equipment on motor vehicles in addition to the specific statutory requirements set forth in that chapter for lighting equipment on motor vehicles. Therefore, the lighting requirements of this chapter must be met, as well as any lighting regulations promulgated by the director for motor vehicles.

Honorable Charles M. Sloan

CONCLUSION

It is the opinion of this office that the so-called "go-carts" are "motor vehicles" and must be licensed as any other motor vehicle if they are to be used upon the highways of this State. A driver of a "go-cart" must be licensed as a motor vehicle operator if he drives his vehicle on a highway. As motor vehicles, they must also meet the statutory equipment and lighting requirements to be operated on a highway.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. J. B. Buxton.

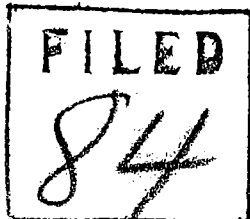
Yours very truly,

John M. Dalton
Attorney General

JBB:mw/om

SCHOOLS: School district may not invest funds
SCHOOL DISTRICTS:
BANKS AND BANKING: in savings deposits.

March 2, 1959



Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

This is in response to your opinion request dated September 25, 1958, which reads as follows:

"Several school districts in Miller County, Missouri, have inquired as to whether or not such districts may legally and lawfully deposit surplus funds in savings account, drawing interest thereupon from banks incorporated under the laws of Missouri.

"I understand that federal banking regulations make provisions that a bank may, if it desires, require 30 days notice before withdrawals.

"I further understand that federal banking regulations prohibit banks from paying interest on saving accounts to State, County, Cities, etc., but that banks may and are permitted to pay interest to school districts on savings accounts.

"The specific question that I would like to have an opinion upon is 'Whether or not a school district may legally and lawfully deposit surplus funds with banks on saving accounts to draw interest.'"

Honorable LeRoy Snodgrass

You are correct in your statement that under federal banking regulations banks may pay interest to school districts on savings accounts. In a ruling of the Board of Governors of the Federal Reserve System, found in the November, 1937, issue of the Federal Reserve Bulletin, it was held that a school district is an "organization operated primarily for religious, philanthropic, charitable, educational, fraternal or other similar purposes and not operated for profit" and, therefore, that deposits of school districts may be classified by Federal Reserve member banks as savings deposits, upon which interest may be paid.

This is only partially determinative of the problem, however. As far as the bank is concerned, it may accept savings deposits for school districts, but there is the further question as to the authority of the school district to invest its funds in savings deposits. It has frequently been stated that a school district is a subordinate agency, subdivision or instrumentality of the state, performing the constitutionally imposed duty of the state in the conduct and maintenance of the public schools. It is a creature of the Legislature, the government and control of which is vested in a board of education. Its board is what the statute makes it, having only such powers as are delegated to it or such as may be derived therefrom (School Dist. No. 6 of Jackson County v. Shawhan et al., Mo. App., 273 SW 182, 184; Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 SW 43; 56 C.J., Schools and School Districts, page 193, Section 46, page 294, Section 152, page 331, Section 202). Consequently, in the investment of funds the board must look to some statute for its authority to do so.

Authority is expressly given boards of directors of school districts to invest surpluses accumulating in the sinking and interest funds in bonds of the United States or bonds of the State of Missouri (Section 165.063, RSMo, Cum. Supp. 1957; Section 108.200, RSMo 1949). By virtue of Section 7 of Article IX, Constitution of Missouri, 1945, and Sections 171.010 - 171.110, RSMo 1949, the county court is given authority to invest the county school fund and the township school fund in government bonds. Also, by reference to the last-mentioned sections, surpluses existing in the county treasury credited to a common school district may, upon application of the directors, be invested by the county court in government bonds, i.e., "in the same manner as township school funds are invested." (Sections 165.243 and 165.247, RSMo 1949.)

Honorable LeRoy Snodgrass

Prior to 1957 these were the only provisions for the investment of school funds.

In 1957, the General Assembly, by House Bill No. 51, amended Section 165.110, RSMo, Cum. Supp. 1957, so that subsection 7 thereof reads as follows:

"Should the board have money in the teachers', incidental, building, sinking or interest funds which will not be needed for a period of at least six months for the purpose for which the money was received, the board may, if it deems it advisable, invest the funds in either open time deposits for ninety days or certificates of deposit in a depository selected by the board, provided the depository has deposited securities under the provisions of sections 110.010 and 110.020, RSMo, or bonds of the state of Missouri, of the United States, or of any wholly owned corporation of the United States provided the bonds are redeemable at maturity at par, or in other short term obligations of the United States. No open time deposits shall be made or bonds purchased to mature beyond the date that the funds are needed for the purpose for which they were received by the school district. Interest accruing from the investment of the surplus funds in such deposits or bonds shall be credited to the fund from which the money was invested."

You will note that this section authorizes investment of surplus funds in "open time deposits for ninety days or certificates of deposit in a depository selected by the board," but says nothing about savings deposits.

In banking parlance, "savings deposit" is not synonymous with either "open time deposit" or "certificate of deposit." Virtually every bank in the state is governed by the regulations of either the Board of Governors of the Federal Reserve System or the Board of Directors of the Federal Deposit Insurance Corporation with respect to the payment of deposits and interest thereon. Congress has given authority to the Board of Governors of the Federal Reserve System to define the terms "demand deposits," "gross demand deposits," "deposits payable on demand,"

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"time deposits," "savings deposits" and "trust funds" by the provisions of Title 12, Section 461, U.S.C.A. Comparable authority was given to the Board of Directors of the Federal Deposit Insurance Corporation in Title 12, Section 1828(g), U.S.C.A., to define "demand deposits," "time deposits" and "savings deposits."

Pursuant to that authority, both the Board of Governors of the Federal Reserve System and the Board of Directors of the Federal Deposit Insurance Corporation have defined the terms "demand deposit," "time deposit" and "savings deposit." For the Federal Reserve System, the definitions are found in the Code of Federal Regulations, Title 12, Section 217.1. For the Federal Deposit Insurance Corporation, they are found in the Code of Federal Regulations, Title 12, Section 329.1. While not identical, the definitions of the two agencies are substantially the same, and those of the Federal Reserve System read as follows:

"(a) Demand deposits. The term 'any deposit which is payable on demand', hereinafter referred to as a 'demand deposit', includes every deposit which is not a 'time deposit' or 'savings deposit', as defined in this section.

"(b) Time deposits. The term 'time deposits' means 'time certificates of deposit' and 'time deposits, open account', as defined in this section.

"(c) Time certificates of deposit. The term 'time certificate of deposit' means a deposit evidenced by a negotiable or nonnegotiable instrument which provides on its face that the amount of such deposit is payable to bearer or to any specified person or to his order:

(1) On a certain date, specified in the instrument, not less than 30 days after the date of the deposit, or

(2) At the expiration of a certain specified time not less than 30 days after the date of the instrument, or

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(3) Upon notice in writing which is actually required to be given not less than 30 days before the date of repayment, and

(4) In all cases only upon presentation and surrender of the instrument.

"(d) Time deposits, open account. The term 'time deposit, open account' means a deposit, other than a 'time certificate of deposit' or a 'savings deposit', with respect to which there is in force a written contract with the depositor that neither the whole nor any part of such deposit may be withdrawn, by check or otherwise, prior to the date of maturity, which shall be not less than 30 days after the date of the deposit, or prior to the expiration of the period of notice which must be given by the depositor in writing not less than 30 days in advance of withdrawal.

"(e) Savings deposits. The term 'savings deposit' means a deposit, evidenced by a pass book, consisting of funds deposited to the credit of one or more individuals, or of a corporation, association or other organization operated primarily for religious, philanthropic, charitable, educational, fraternal or other similar purposes and not operated for profit; or in which the entire beneficial interest is held by one or more individuals or by such a corporation, association or other organization, and in respect to which deposit:

(1) The depositor is required, or may at any time be required, by the bank to give notice in writing of an intended withdrawal not less than 30 days before such withdrawal is made;

(2) Withdrawals are permitted in only two ways, either (i) upon presentation of the pass book, through payment to the person presenting the pass-book, or (ii) without presentation of the pass book, through payment to the depositor himself but not to any

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other person whether or not acting for the depositor.

"The presentation by any officer, agent or employee of the bank of a pass book or a duplicate thereof retained by the bank or by any of its officers, agents or employees is not a presentation of the pass book within the meaning of this part except where the pass book is held by the bank as a part of an estate of which the bank is a trustee or other fiduciary, or where the pass book is held by the bank as security for a loan. If a pass book is retained by the bank, it may not be delivered to any person other than the depositor for the purpose of enabling such person to present the pass book in order to make a withdrawal, although the bank may deliver the pass book to a duly authorized agent of the depositor for transmittal to the depositor.

"Every withdrawal made upon presentation of a pass book shall be entered in the pass book at the time of the withdrawal, and every other withdrawal shall be entered in the pass book as soon as practicable after the withdrawal is made.

"The term 'savings deposit' also means a deposit evidenced by a written receipt or agreement although not by a pass book, consisting of funds of the kind described above in this paragraph and in respect to which deposit the depositor is required, or may at any time be required, by the bank to give notice in writing of an intended withdrawal not less than thirty days before such withdrawal is made, and withdrawals are permitted only through payment to the depositor himself but not to any other person whether or not acting for the depositor."

The Legislature, in Section 165.110, supra, is presumed to have used the words "open time-deposits" and "certificates of deposit" as those terms are generally understood in the banking

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world (Section 1.090, RSMo 1949). Since savings deposits differ in some respects from both open time deposits and certificates of deposit and no authority has been granted to school districts to invest their funds in savings deposits, they may not do so.

CONCLUSION

It is the opinion of this office that school districts are not authorized to invest any of their funds in savings deposits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

MUNICIPAL LIBRARY ELECTIONS:
ELECTION EXPENSES:
COUNTY COURT:

The County of Cape Girardeau is responsible and liable for the expenses of a municipal library district election authorized by Section 182.030, RSMo Cum. Supp. 1957.

March 20, 1959



Honorable Richard E. Snider
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Snider:

This is in response to your letter of March 6, 1959, in which you inform us that the county court of Cape Girardeau County has been petitioned, in accordance with Section 182.030, RSMo Cum. Supp. 1957, to conduct an election for the joining of the city municipal library district with the county library district. We quote that letter in part:

"The City of Jackson, Missouri, has petitioned the county court to hold an election for the joining of the City Municipal Library District with the County Library District. As you can see from my letter to Mr. Crites, I have advised him that the county should not be liable for the expense of such an election.

"I would appreciate your opinion on this matter as soon as possible as we plan to hold the election the first part of April."

Section 182.030, RSMo Cum. Supp. 1957, states:

"Whenever qualified electors equal to five per cent of the total vote cast for governor at the last election in an existing municipal library district within the geographical boundaries of a proposed or existing county library district shall petition in writing the county court to be included in the proposed or existing county library district, subject to the

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official approval of the existing county library board, the qualified voters of the municipal library district shall be permitted to vote on the proposition for establishing or joining the county library district, and on the proposition for a tax levy for establishing and maintaining a free county library. If the proposition carries by a majority vote, the municipal library district shall become a part of the county library district at the beginning of the next fiscal year and the property within the municipal library district shall be liable to taxes levied for free county library purposes. If a majority of voters in the existing municipal library district oppose the county library district, the existing municipal library district shall continue."

You will observe from Section 182.030 that the petition submitted by the qualified electors of the existing municipal library district to the county court is for the purpose of seeking the court's permission to be included in the proposed or existing county library district. We observe that such permission would apparently be subject to the official approval of the existing county library board. It is our belief that it is of some significance that these voters are required to petition the county court.

The Supreme Court of Missouri, Division 1, in the case of King v. Maries County, 249 S.W. 418, March 5, 1923, states on page 420 as follows:

"[1,2] It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. * * * This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * *"

Although Section 182.030 is something less than perfectly

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clear, it is our opinion that this section authorizes the county court to permit and provide for and conduct this election. Even though the provision for liability for the expense of such a municipal library district election is not expressly provided for in this section, the rule in the King case should be applicable. With the express authorization of the conduct of this election by the county court there is necessarily implied the power and authority to pay for such conduct of that election with the appropriate funds subject to expenditure by the county court.

Section 182.030 does not authorize any action by a city, nor does it authorize action by a group which has available funds for expenditures on such occurrences. It would be difficult to construe the intention of the legislature in enacting this section in any other manner than to say that when the county court approves such an election, and authorizes it, the county would be liable for the expenses thereof.

CONCLUSION

It is the opinion of this office that the county of Cape Girardeau is responsible and liable for the expenses of a municipal library district election authorized by Section 182.030, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

TAXATION:

COUNTY COLLECTOR:

SCHOOLS:

(1) A county collector in a county of the third class is to be compensated for performing services in connection with a supplemental tax book on the same basis that he is compensated for services performed in connection with the regular tax book. (2) Where a corrected tax rate for a particular school district is certified after the average rate, the average rate should be re-determined and the railroads and public utilities' taxes should be re-computed based upon the corrected average rate. (3) The school district or county superintendent of schools would not be liable for the additional expenses incurred by the county collector for making corrections based upon a supplemental tax book made necessary by the failure of the proper officials to certify in the first instance the correct tax rate for a particular school district.

November 11, 1959

Honorable Richard E. Snider
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Mr. Snider:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"The R-4 School District of Cape Girardeau County voted a bond issue this summer which increased their taxes Seventy Cents, (\$.70). However, the school board and the county superintendent submitted the estimate for that district to the county court on the basis of the old tax rate of One Dollar and Twenty-five Cents, (\$1.25), rather than the tax rate increased by the bond levy, or One Dollar and Ninety-Five Cents, (\$1.95). The county clerk's office extended these taxes, figured the average tax, determined the railroad and utilities, prepared the statements, and turned the tax books over to the county collector. Then when tax payers of the R-4 district started paying their taxes, it was discovered that the Seventy Cent, (\$.70), bond levy was not included on their statements. I requested help from your office and was told by phone and through very helpful opinions which had previously been written that it would be necessary for us to prepare supplemental tax books and send out supplemental tax statements. It seems to me to be unquestionable that the county clerk must be and can be compensated for this additional work.

"However, I would like to know how the county collector can be compensated for the extra expense

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which he is going to be put to. It is going to be necessary for him to mail out approximately one thousand six hundred statements, he must abstract, post in two books and in many instances will be required to collect the taxes from the same people twice.

"At one-half of one per cent based on the approximate Nine Thousand Dollars (\$9,000.00), which will be collected, the collector will lose approximately Three to Five Hundred Dollars.

"I would also like to know whether or not we are required to re-figure the average tax rate and re-determine the railroad and utilities tax. I am sure that the cost and trouble of doing this would be greater than the increase in the railroad and utilities tax.

"Is it possible that the R-4 school district or the county superintendent is responsible for this added expense? If so, is the county duty bound to enforce this responsibility?"

You inquire first as to how the county collector is to be compensated for the extra expense that must necessarily be incurred under the facts outlined. Concerning the supplemental tax book we invite your attention to Section 137.300, RSMo 1949, which section reads in part as follows:

" * * * In making said supplemental tax book, and in all subsequent proceedings thereon, the county court, clerk of the same and the collector shall be governed by the same law as is now or at the time then being or may be in force for the same duties, and shall receive the same compensation as is now or at the time then being or may be provided by law for similar duties; * * * "

We also invite your attention to Section 165.093, RSMo 1949, which provides that for collecting the school taxes the collector shall receive as full compensation for his services the same percentage as is allowed by law for collecting other taxes. Said section reads as follows:

Honorable Richard E. Snider

"It shall be the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general tax books; and the collector shall proceed to collect the same in like manner as the state and county taxes are or may be collected, and he shall receive, as full compensation for his services on the amount collected and paid over by him, the same per cent as is allowed by law to collectors for collecting other taxes; and he shall pay over monthly, to the county treasurer, all such taxes collected and take his receipt therefor."

We have not been able to find any other statutory provisions which would allow the collector any other or further compensation for performing his duties in connection with a supplemental tax book. We therefore conclude that the collector in counties of the third class is to be compensated for performing services in connection with a supplemental tax book on the same basis that he is compensated for duties performed in connection with the regular tax book. A like conclusion has been previously reached dealing with the compensation of the county clerk. See opinion of this office to Alden S. Lance, Prosecuting Attorney, Andrew County, dated October 27, 1955.

We understand from talking with your county collector that it is possible that the additional expenses will cause the collector's office to exceed the amount budgeted for the operation of the office for this year. We further understand that your county has on hand an unincumbered surplus which could be used to meet these additional expenses. In view of such fact we do not foresee any difficulty in this regard since it has been held by the Supreme Court of Missouri in the case of *State ex rel. vs. Cribb*, 273 SW2d 246, that a county can spend funds even though not budgeted for a particular purpose if such expenditure does not obligate the county in a sum in excess of the revenue provided for the year plus any unincumbered balances from previous years.

You next inquire whether or not it is necessary to re-compute the average tax rate and re-determine the railroad and utility taxes. The statutory provision for determining the average rate levied against railroads and public utilities is found in Section 151.150, RSMo 1949. We find nothing which would excuse the railroads and utilities from paying taxes upon their property using a rate determined

Honorable Richard E. Snider

by using the corrected rate in District R-4 merely because there was a failure to certify the correct rate prior to the time that the average rate was computed. In fact, it would seem that the bond-holders would be in a position, by proper legal proceedings, to compel the re-computation of the average rate. Further, it seems to us that the situation with which you are involved is no different than if the school district had increased their total rate by proper action after the average school rate had been determined. We therefore believe that the railroad and utility taxes should be re-determined using an average rate computed by including the corrected rate in R-4 School District.

Lastly, you inquire whether the additional expenses incurred by the collector's office as a result of the necessity for making corrections based upon a supplemental tax book could be imposed against the school district or county superintendent of schools under the facts outlined. We have searched the statutes and find no provision which would, under these facts, make the school district or county superintendent of schools liable for the additional expenses.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that:

(1) A county collector in a county of the third class is to be compensated for performing services in connection with a supplemental tax book on the same basis that he is compensated for services performed in connection with the regular tax book.

(2) That where a corrected tax rate for a particular school district is certified after the average rate, the average rate should be re-determined and the railroad and public utility taxes should be re-computed based upon the corrected average rate.

(3) That the school district or county superintendent of schools would not be liable for the additional expenses incurred by the county collector for making corrections based upon a supplemental tax book made necessary by the failure of the proper officials to certify in the first instance the correct tax rate for a particular school district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donal D. Guffey.

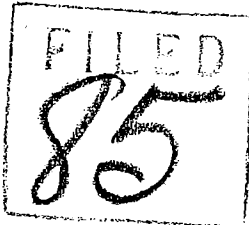
Yours very truly,

JOHN M. DALTON
Attorney General

DDG/mlw
Enclosure

PRISONS:
SENTENCES:
CUMULATIVE SENTENCES:
JUDGMENTS:

A prisoner sentenced subject to Section 222.020 serves a cumulative sentence. He serves his first sentence completely, then starts on his second sentence. Prison authorities are powerless to change the order in which the sentences are served.



February 10, 1959

Hon. Ben B. Stewart, Member
Board of Probation and Parole
Jefferson Building
Jefferson City, Missouri

Dear Sir:

You recently requested an opinion from this office as follows:

"Confirming our conversation of January 8, and receipt of your letter of January 9, regarding the Board's request for our opinion on deferred sentences, at which time it was decided to withdraw the request, and that you would place it in your hold file until you heard from us.

"We do request an opinion on the difference between a deferred sentence and a consecutive sentence. It is noted that many times an individual is sentenced to serve several sentences consecutively. For example, an individual is charged with three counts of Robbery and is sentenced to serve five years on each count, and each count is to run consecutively, making a total of fifteen years. This is called a consecutive sentence.

"A deferred sentence is one which the individual receives after another conviction, and is ordered not to begin until the expiration of the sentence he is now serving. For example, an individual is serving a sentence in the penitentiary, and is convicted of another crime. Under Section 222.020 MoRS 1949, it states, in part,

Hon. Ben B. Stewart

'...the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held;...'

"Is this, in effect, a consecutive sentence, or does the first sentence have to be served before the second begins?

"We would appreciate an opinion on the difference between a consecutive sentence and a so-called deferred sentence."

Section 222.020 reads as follows:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held; provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Your question concerns the difference, if any, between a cumulative sentence made so by order of court and the sentence meted out in compliance with Section 222.020. It is my understanding from your letter and from discussions on the subject with you that the Prison Records Department classifies all sentences given under Section 222.020 as deferred sentences.

This writer found no instance in which a court referred to a deferred sentence. The court generally refers to only two classes of sentences--concurrent and consecutive. The court in *Williford v. Stewart*, 198 S.W. 2d 12, in discussing this matter, states in paragraph 2, page 14, as follows:

Hon. Ben B. Stewart

"* * * The rule is that where the later judgment is silent on the point the sentences run concurrently. To make them consecutive there ordinarily must be some provision in the judgment or a statutory requirement to that effect. * * *"

A sentence under Section 222.020, we feel, is a cumulative sentence made so by statute. It differs in some respects, however, from the cumulative sentence which is pronounced by the court. The statute, Section 222.020, makes it mandatory that the prisoner serve the sentence under which he is first held before starting the service of the sentence later imposed. In *Ex parte Green*, 17 S.W. 2d 939, the court passed on the order in which sentences should be served under this section. Green was convicted of highway robbery in 1921 in St. Charles County, was sentenced to prison and paroled in 1923. In January, 1925, while on parole, Green committed a burglary in Lafayette County and his parole was revoked. He was convicted in March of 1925 in Lafayette County and returned to prison. He filed a writ of habeas corpus and the warden's return to the writ stated that Green was held under the St. Charles County conviction and that the prisoner had completed service of the time under the Lafayette County conviction. The court said, local citation 940, as follows:

"When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be served. That question is determined by section 2292, R.S. 1919, as follows:

' * * * And if any convict shall commit any crime in the penitentiary, or in any county in this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held.'

Hon. Ben B. Stewart

"It follows the petition is remanded to the custody of the Warden to serve the sentences imposed in accordance with the views herein expressed."

The court more recently in the case of Herring v. Scott, 142 S.W. 2d 670, approved the above doctrine, saying at page 672:

"* * * Furthermore, the Lee case was decided by Division 2 of this court in 1921, and the question was reconsidered by the court en banc in 1929, Ex parte Green, 322 Mo. 857, 17 S.W. 2d 939. There the court held unanimously (without mentioning the Lee case, it is true) that the prison officials were without authority to determine the order in which the sentences should be served, and that the requirement of the statute is controlling.

"While the motive of the legislators in passing the statute partly may have been to prevent such sentences from running concurrently, still they must have meant more than that. They were not dealing with offenses having some relation to each other, such as those of kindred nature or committed or tried about the same time, where the idea of concurrent execution would more naturally occur. They were contemplating a situation where a convict under sentence for one felony commits another perhaps of a different kind and at a remotely later time. They saw fit to require that in event of conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the State for the first. Having so declared in a solemn legislative act, we are not at liberty to amend it by construction. The Green case so rules the question directly."

CONCLUSION

Therefore, we feel that a prisoner sentenced subject to

Hon. Ben B. Stewart

Section 222.020 serves a cumulative sentence. He serves his first sentence completely, then starts on his second sentence. Prison authorities are powerless to change the order in which the sentences are served.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

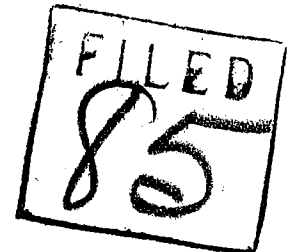
JOHN M. DALTON
Attorney General

JEC:mc

TIME OF PAROLE
APPLICATION:

It is the meaning of House Bill No. 262, enacted by the 70th General Assembly, that allowed time served in jail does apply as time served on a sentence to the Department of Corrections for parole application purposes.

August 18, 1959



Hon. Ben B. Stewart, Member
Board of Probation and Parole
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"In reference to House Bill #262 of the 70th General Assembly, the question has arisen relative to eligibility of prisoners for parole hearing.

"In paragraph 1 of Section 549.261 MoRS Cumulative Supplement 1957, it states, in part, 'Any person confined in any correctional institution administered by state authorities.'

"In paragraph 2 of Section 549.261 MoRS Cumulative Supplement 1957, it states, in part, 'Any person who has been committed to a penal or correctional institution under the administration of the department of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing.'

"The question is, does the allowed time served in jail apply as time served for parole hearing purposes, or must the individual actually be committed to the Department of Corrections and serve the necessary required time in the Department of Corrections before being eligible for a parole hearing?"

Hon. Ben B. Stewart, Member

Because of its comparative brevity we shall here set forth in full House Bill No. 262, referred to by you above, which we are called upon to construe. This bill reads:

"Section 1. When a person has been convicted of a criminal offense in this state

(1) the time spent by him in prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections shall be calculated as a part of the sentence imposed upon him; and

(2) the time spent by him in prison or jail prior to his conviction and the date on which sentence is pronounced may, in the discretion of the judge pronouncing sentence, be calculated as a part of the term of the sentence imposed upon him.

"2. When the time spent in prison or jail is calculated as a part of the term of the sentence under the provisions of subdivision 1 of this section, the time so spent in prison or jail shall, in addition to any reduction of time allowed under section 216.355, RSMo, be deducted from the term of the sentence.

"3. It is the duty of the officer required by law to deliver a convicted person to the state department of corrections to endorse upon the commitment papers the length of time spent by the person in a prison or jail subsequent to the date of his sentence and prior to his delivery to the state department of corrections, and if, by the terms of the sentence, the time spent in prison or jail prior to conviction and sentence is to be calculated as a part of the term, the officer shall also endorse upon the commitment papers the length of time spent in prison or jail prior to the person's conviction and sentence."

Numbered paragraphs 1 and 2 of Section 549.261, MoRS, Cum. Supp. 1957, referred to by you above reads:

"1. When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any

Hon. Ben B. Stewart, Member

person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.

"2. Any person who has been committed to a penal or correctional institution under the administration of the department of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing. Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served."

Section 549.261, supra, relates to the time when a person who has been committed to a penal or correctional institution under the administration of the Department of Corrections may apply for a parole. Under the terms of this section, numbered paragraph 2, we note that such application may be made by one "who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is the shorter period. . . ." Also "Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period. . . ."

House Bill No. 262 states that the time spent in jail (1) "shall be calculated as a part of the sentence imposed upon him. . . ." and (2) "be calculated as a part of the term of the sentence imposed upon him." Why the word "term" is inserted in paragraph 2 and is omitted in paragraph 1 we do not know, but we do not see any reason to believe that the insertion of the word "term" makes the meaning any different than in paragraph 1. It would seem that both simply mean that "jail time" shall be "calculated" or figured in as a part of the sentence. We note also that there is nothing to indicate that this "jail time" shall be deducted from the latter end of the sentence rather than from the first part of the sentence.

It may be pertinent to note here that while, from the standpoint of the prisoner, this matter is one of importance, that

Hon. Ben B. Stewart, Member

from the standpoint of the state it is not fraught with any particular consequences because all that House Bill No. 262 does so far as a parole hearing is concerned is simply to affect the date when a prisoner may make an application for a parole. Whether or not the application will be granted is wholly a matter within the discretion of the parole board.

CONCLUSION

It is the opinion of this department that it is the meaning of House Bill No. 262, enacted by the 70th General Assembly, that allowed time served in jail does apply as time served on a sentence to the Department of Corrections for parole application purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bw

**PROSECUTING ATTORNEY'S
MILEAGE:**

A prosecuting attorney is not entitled to mileage for driving to the magistrate court in a town other than the town in which he resides, but in the same county, in order to discharge his official duties. However, prosecuting attorneys may be reimbursed for actual and necessary traveling expenses incurred in the investigation of crimes.

September 17, 1959

Honorable Frederick E. Steck
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Mr. Steck:

I have your letter of August 10, 1959, requesting my opinion regarding certain matters of mileage connected with the discharge of your duties. Your letter reads:

"I am the Prosecuting Attorney of Scott County. The County Seat is located in Benton, Missouri, and I live in Sikeston, Missouri. The Magistrate Judge of said Scott County holds Court on Tuesday mornings in Sikeston, Missouri, and on Wednesday mornings at the Court House in Benton, Missouri. Is the Prosecuting Attorney entitled to mileage for driving back and forth to the Magistrate Court in Benton, since, even if he lived in Benton which is the County Seat, he would still have to travel once a week to Sikeston, Missouri.

"Also I would like to know when the Prosecuting Attorney has to go to Benton to the County Jail for the purpose of talking to or interrogating persons arrested in regard to a crime he is being charged with, is he entitled to mileage for this?"

In regard to your first question I find no statutory authority which would entitle the prosecuting attorney to receive mileage under the conditions set forth in your question. You are aware of the principle of law set forth in the case of Nodaway County vs. Kidder, 129 SW2d 857, 1.c. 860 (8), in which the Supreme Court held:

"It is well established that a public officer claiming compensation for official

Honorable Frederick E. Steck

duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

In view of the fact that there does not appear to be any statutory authority for mileage under the circumstances here involved and in view of the legal principle set forth in the Nodaway County case that before a county official can receive compensation he must point to the law which authorizes it, I believe that the answer to your first question is in the negative.

In regard to your second question, which is as to mileage in the investigation of crimes I enclose copies of the following opinions:

February 26, 1941, Robert P. C. Wilson, III,
Prosecuting Attorney Platte County
January 23, 1947, James L. Paul, Prosecuting
Attorney, McDonald County;
August 7, 1951, R. M. Gifford, Prosecuting
Attorney, Sullivan County.

You will note that the above opinions hold that the prosecuting attorney may be reimbursed for actual and necessary traveling expenses incurred in the investigation of crimes. If your travels to the jail in Benton can come within this category, then on the basis of the opinions enclosed you would be entitled to reimbursement. Whether it would come within this category is a matter which I believe would have to be determined in each particular case.

CONCLUSION

It is the opinion of this department that a prosecuting attorney is not entitled to mileage for driving to the magistrate court in a town other than the town in which he resides but in the same county in order to discharge his official duties.

It is the further opinion of this department that prosecuting attorneys may be reimbursed for actual and necessary traveling expenses incurred in the investigation of crimes.

Honorable Frederick E. Steck

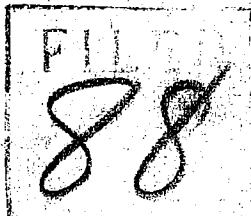
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh F. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW/mlw
Enclosures

APPROPRIATIONS: Right of General Assembly to amend an appropriation
GENERAL ASSEMBLY: law.



January 6, 1959

Honorable J. E. Taylor
Director, Division of
Employment Security
Jefferson City, Missouri

Dear Sir:

This refers to your letter requesting an opinion whether a law enacted by the Sixty-ninth General Assembly appropriating money for the period beginning July 1, 1958, and ending June 30, 1959, may be amended by the Seventieth General Assembly to provide that the appropriation is for the period beginning July 1, 1958, and ending June 30, 1960, or, in other words, for two fiscal years instead of one fiscal year, as originally provided.

The general rule is that, subject only to constitutional limitations, a state legislature may amend any existing law of the state. Thus, in 82 Corpus Juris Secundum, Statutes, Section 9 at pages 23 and 24, it is stated:

"Subject only to constitutional limitations and excepting only those subjects delegated to the federal government or prohibited by the federal Constitution, * * * * * state legislatures have power to enact statutes or laws, which power has been characterized in various ways, such as absolute, plenary, or supreme. * * * * *

"The power of a legislative body to enact statutes or law is a continuing one, and the exercise of the power once does not exhaust it, but it may from time to time amend, extend, or restrict the original enactment provided it keeps within constitutional bounds. * * * * *

Again, in 82 Corpus Juris Secundum, Statutes, Section 243b, at pages 412 and 413, it is stated:

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"Generally, the power to amend statutes resides in the lawmaking body; courts have no power to amend statutes, and should not attempt to do so. While it is as competent for the people to withhold from the legislature the power of amending an act as to withhold the power of amending the constitution itself, generally the power to amend or modify statutes resides in the legislature, in any manner not inconsistent with some provision of the constitution limiting the legislative power in that respect; and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the amendment of statutes. It is competent for the legislature, at the same session, to alter, modify, or repeal a law by a subsequent act, and a succeeding legislature can amend acts passed by its predecessors without express authority. * * * * *

In *Birmingham Drainage District vs. Chicago, Burlington & Quincy Railroad Company, Mo.*, 202 S.W. 404, 409, in dealing with the validity and effect of a law in the light of previously enacted statutes, the Supreme Court of Missouri stated with respect to the previously enacted statutes as follows:

"* * * * *The right to enact these statutes includes the right to repeal or modify them or to limit their application in any manner not inconsistent with some provision of the Constitution limiting the legislative power in that respect. * * * * *

See also *State ex rel. Drain vs. Becker, Mo.*, 240 S.W. 229.

We find no authority in Missouri or elsewhere that the rule with respect to the amendment of appropriation laws is any different from that applicable to the amendment of other laws; and, therefore, it appears that the right of a state legislature to amend any existing appropriation law is subject only to constitutional limitations thereon.

It will be noted that in the foregoing we have referred only to the amendment of existing laws and, since questions have arisen in some jurisdictions with respect to a right of a legislature to amend a law which has expired, it should be stated here that we are assuming, for the purposes of this opinion, that the law making the amendment in question would become effective prior to June 30, 1959, so that it is not necessary to discuss questions which might arise if the amendment

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did not become effective until after the expiration of the period for which the appropriation was originally made.

Article III, Section 1, Constitution of Missouri, provides generally that the legislative power shall be vested in the General Assembly; and we find nothing in the Constitution which so limits that power as to prevent the amendment of an existing appropriation law in the manner described above. In this connection, it will be noted that such an amendment would not conflict with the provision of Article IV, Section 23, Constitution of Missouri, that the General Assembly shall make appropriations for one or two fiscal years, since the amendment would simply extend the appropriation period from one fiscal year to two fiscal years. It also should be noted that the amendment would be liberalizing in nature and could in no wise adversely affect the rights of persons who had entered into contracts with the state in reliance upon the appropriation as originally made.

Finding no constitutional limitation prohibiting the enactment of an amendment of the kind described above, it is our opinion that the General Assembly has the right and power to enact such an amendment.

CONCLUSION

It is the opinion of this office that a law enacted by the Sixty-ninth General Assembly appropriating money for the period beginning July 1, 1958, and ending June 30, 1959, may be amended by the Seventieth General Assembly, by a law effective on or before June 30, 1959, to provide that the appropriation shall be for the period beginning July 1, 1958, and ending June 30, 1960.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

Yours very truly,

John M. Dalton
Attorney General

JCB:mw

CORPORATIONS NOT
FOR PROFIT:

Section 355.335, RSMo Supp. 1957, of Missouri's General Not for Profit Corporation Law, does not authorize Secretary of State of Missouri to issue a certificate of authority to Teachers Insurance and Annuity Association of America, a New York corporation, to conduct its affairs in Missouri.

March 24, 1959



Honorable Walter H. Toberman
Secretary of State
State Capitol
Jefferson City, Missouri

Dear Mr. Toberman:

This opinion is rendered in reply to your recent inquiry reading as follows:

"It is respectfully requested that you advise this office as to whether or not the applicant can be properly admitted to this State pursuant to the foreign qualification provisions of Chapter 355. In consideration of this proposition, you will note that Article (7) of the Articles of Incorporation of applicant provides a capital structure of \$500,000.00, divided into 500 shares of \$1,000.00 par value each."

Documentary evidence submitted with your request allows us to restate the question in the following language:

Does Section 355.335, RSMo Supp. 1957, of Missouri's General Not for Profit Corporation Law, authorize the Secretary of State of Missouri to issue a certificate of authority to Teachers Insurance and Annuity Association of America, a New York Corporation, to conduct its affairs in Missouri?

Section 355.335, RSMo Supp. 1957, is found in the General Not for Profit Corporation Act, at Chapter 355, RSMo Supp. 1957, and reads as follows:

"A foreign corporation to which this chapter is applicable shall procure a certificate of authority from the secretary of state before conducting any affairs in this state. A foreign corporation shall not be denied a certificate of authority by reason of the fact

Honorable Walter H. Toberman

that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation."

Before discussing applicable statutes in Chapter 355, RSMo Supp. 1957, we will make observations concerning the corporate character and basic organization of Teachers Insurance and Annuity Association of America based on documentary evidence submitted with your request for this opinion.

The charter of Teachers Insurance and Annuity Association of America discloses that it is a corporation organized under applicable provisions of the insurance laws of the State of New York, with corporate powers vested in and being exercised by a board of trustees, and officers and agents to be appointed by such trustees; that the corporation has powers of life insurance companies organized under the insurance laws of New York, but must transact its business exclusively on a nonmutual basis and may issue only non-participating policies; that the capital of the corporation is Five Hundred Thousand Dollars (\$500,000) divided into five hundred (500) shares of One Thousand Dollars (\$1,000) each; that the purpose of the corporation is specifically spelled out in the following language from Article Eight of its Charter:

"The purpose of the corporation is to aid and strengthen nonproprietary and nonprofit-making colleges, universities and other institutions engaged primarily in education or research by providing annuities, life insurance, and sickness and accident benefits suited to the needs of such institutions and of the teachers and other persons employed by them on terms as advantageous to the holders and beneficiaries of such contracts and policies as shall be practicable, and by counselling such institutions and their employees concerning pension plans or other measures of security, all without profit to the corporation or its stockholders. The corporation may receive gifts and bequests to aid it in performing such services."

Honorable Walter H. Toberman

The capital stock of Teachers Insurance and Annuity Association of America appears to be wholly owned by Trustees of T. I. A. A. Stock, a non-profit corporation organized by an Act of the legislature of New York approved June 3, 1937. A review of the Charter of Trustees of T. I. A. A. Stock, and the charter of Teachers Insurance and Annuity Association of America, discloses abundant language to support a contention that Teachers Insurance and Annuity Association of America is not formed with a purpose of "profit" upon its original capital structure.

Teachers Insurance and Annuity Association of America is admittedly authorized to engage in the insurance business and in the business of issuing annuity contracts in the manner followed by regular life insurance companies, and it merely enjoys an exempt status from general regulatory laws of the State of New York applicable to regular life insurance companies by virtue of the following language from Sections 44 and 45, Article 4, Chapter 28, Consolidated Laws of New York:

"44. The following insurers, and their officers, agents, representatives and employees, as such, shall be exempt from the licensing and other requirements imposed by the provisions of this chapter to the extent hereinafter; but no such exemption shall affect the provisions of article sixteen:

1. All charitable annuity societies which comply with the requirements of section forty-five, to the extent therein stated.

* * *

"45. 1. The superintendent may, in his discretion, issue a special permit to make annuity agreements with donors to any duly organized domestic or foreign non-stock corporation or association conducted without profit engaged solely in bona fide charitable, religious, missionary, educational or philanthropic activities and which shall have been in active operation for at least ten years. * * *

We cite the foregoing statutes of the State of New York solely to show that Teachers Insurance and Annuity Association of America is engaged in the insurance business and in the business of issuing annuity contracts, but enjoys an exempt status from certain regulatory provisions of the insurance laws of New York applicable to regular life insurance companies.

Having disclosed the corporate character of Teachers Insurance and Annuity Association of America under the laws of its home state, New York, we now review pertinent provisions of Chapter 355, RSMo Supp. 1957, to determine if such foreign corporation may be licensed under such law to conduct its operations in Missouri.

Honorable Walter H. Toberman

Section 355.015, RSMo Supp. 1957, defines "foreign corporation" and "not for profit corporation" in the following language:

"As used in this chapter, unless the context otherwise requires:

* * * * *

(2) 'Foreign corporation' means a not for profit corporation organized under laws other than the laws of this state for the purpose or purposes for which a corporation might be organized under this chapter.

(3) 'Not for profit corporation' means a corporation no part of the income or property of which is distributable to its members, directors or officers; provided, however, that the payment of reasonable compensation for services rendered and the making of distributions not representing pecuniary profits or gains upon dissolution or final liquidation, as permitted by this chapter, shall not be deemed a distribution of income or property."

Looking to the foregoing definition of "foreign corporation," may it be concluded that Teachers Insurance and Annuity Association of America is organized "for the purpose or purposes for which a corporation might be organized" under Chapter 355, RSMo Supp. 1957, as such quoted language is used in the above definition of "foreign corporation"? An answer to such question relating to "purposes" must be found in the language of Section 355.025, RSMo Supp. 1957, reading as follows:

"Not for profit corporations may be organized under this chapter for any one or more of the following or similar purposes: charitable; benevolent; eleemosynary; educational, civic; patriotic; political; religious; cultural, social welfare; health; cemetery; social; literary; athletic; scientific; research; agricultural; horticultural; soil, crop, livestock and poultry improvement; professional, commercial, industrial, or trade association; wild life conservation; homeowner and community improvement association; and recreational club or association; or for the purpose of executing any trust, or administering any

Honorable Walter H. Toberman

community chest, fund or foundation, to further objects which are within the purview of this section. No group, association or organization created for or engaged in business or activity for profit, or on the cooperative plan, provision for the incorporation of which is made by any of the incorporation laws of this state, shall be organized or operate as a corporation under this chapter." (Under-scoring supplied.)

The specific purposes set forth in Section 355.025, supra, are comprehensive, but are subject to limitations found in the language we have underscored in the statute. While Article Eight of the charter of Teachers Insurance and Annuity Association of America, quoted in the forepart of this opinion, clearly states that the purpose of the corporation "is to aid and strengthen nonproprietary and non-profit making colleges, universities and other institutions engaged primarily in education or research," such purpose is to be accomplished by conducting a life, health and accident insurance business, and the business of selling annuity contracts, such as is conducted by life insurance companies. Further, we have disclosed in the earlier portions of this opinion how such corporation is formed under the insurance code of the State of New York, and enjoys an exemption from general regulatory provisions of such insurance code solely by reason of arbitrary statutory directive and not by reason of any difference in character of its insurance and annuity business from that carried on by regularly licensed life companies. These observations enable us to reasonably conclude that Teachers Insurance and Annuity Association of America, if licensed to conduct its activities in Missouri, would be engaging in life, accident and health insurance business, and in the business of selling annuity contracts, the same as life insurance companies which are formed for profit or on a cooperative plan under and regulated by the insurance code of Missouri. The insurance code of Missouri does not contain an exemption statute similar to that found in the insurance code of New York applicable to the type of corporation in question.

In view of the fact that the insurance code of Missouri does provide for the organization and operation, on a profit plan as well as on a cooperative plan, of corporations seeking to conduct the business to be carried on by Teachers Insurance and Annuity Association of America, such corporation must be considered as coming within the prohibition contained in the latter portion of Section 355.025, RSMo Supp. 1957. In other words, since the subject corporation could not be formed under Missouri's General Not for Profit Corporation Law, it may not be considered within

Honorable Walter H. Toberman

the definition of "foreign corporation" found at Section 355.015, RSMo Supp. 1957, in the following language:

"* * (2) 'Foreign corporation' means a not for profit corporation organized under laws other than the laws of this state for a purpose or purposes for which a corporation might be organized under this chapter."

Another positive prohibition contained in Missouri's General Not for Profit Corporation Law pertains to capital stock and distribution of income and dividends, and is found in the following language from Section 355.030, RSMo Supp. 1957:

"1. A corporation shall not have or issue shares of stock.

"2. No dividend shall be paid and no part of the income or property of a corporation shall be distributed to its members, directors or officers; provided, however, that a corporation may pay compensation in a reasonable amount to members, officers or directors for services rendered and may make distribution upon dissolution or final liquidation as permitted by this chapter."

Article Seven of the charter of Teachers Insurance and Annuity Association of America provides for capital stock shares in the following language:

"The capital of the corporation shall be Five Hundred Thousand Dollars (\$500,000) which shall be divided into five hundred (500) shares of One Thousand Dollars (\$1,000) each."

In view of the foregoing, it may reasonably be concluded that Teachers Insurance and Annuity Association of America, a New York corporation, is not a foreign corporation to which Chapter 355, RSMo Supp. 1957, is applicable and is not entitled to procure a certificate of authority from the Secretary of State of Missouri to conduct its affairs in Missouri.

Returned herewith are all enclosures of your letter of February 25, 1959.

Honorable Walter H. Toberman

CONCLUSION

It is the opinion of this office that Section 355.335, RSMo Supp. 1957, of Missouri's General Not for Profit Corporation Law, does not authorize the Secretary of State of Missouri to issue a certificate of authority to Teachers Insurance and Annuity Association of America, a New York corporation, to conduct its affairs in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLON:om

CORPORATIONS:

Small business investment company may be organized under Missouri General and Business Corporation Act.

April 29, 1959

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri



Dear Mr. Toberman:

We have your request for an opinion of this office, reading as follows:

"Enclosed herewith is a copy of proposed articles of incorporation which have been submitted to this department for approval.

"This department is of the opinion that such a corporation may not be organized under Chapter 351, since the activities of the corporation under the Federal law extends itself into the field of the mortgage loan business. As you of course know, this activity is prohibitive under Section 351.020.

"It is deemed by this department it is of sufficient importance to request from your office an official opinion in this matter, since the Federal Government stands ready to issue charters to organizations in this State which do not have laws within the framework of the Federal Act. Any opinion as to the State of Missouri's position in this matter we feel should come from your office.

"Submitted is the following question:

"May a corporation be organized under Chapter 351 for the purpose of conducting a business within the meaning of the Small Business Investment Act of 1958?"

The "Small Business Investment Act of 1958" (Public Law 85-699, 85th Congress, Second Session, 72 Stat. 689, Title 15, U.S.C.A., Sections 661-696) provides for the incorporation of small business investment companies. Such companies may be chartered by the Small Business Administration when investment companies cannot be chartered under state laws and operate in ac-

Honorable Walter H. Toberman

cordance with terms of the federal act (Section 102; 15 U.S.C.A. § 661). We must, therefore, consider the purposes which the federal act contemplates that such companies shall exercise.

Section 301 of the federal act (15 U.S.C.A. §681) provides, in part, as follows:

"(b) The articles of incorporation of any small business investment company shall specify in general terms the objects for which the company is formed, the name assumed by such company, the area or areas in which its operations are to be carried on, the place where its principal office is to be located, and the amount and classes of its shares of capital stock. Such articles may contain any other provisions not inconsistent with this Act that the company may see fit to adopt for the regulation of its business and the conduct of its affairs. Such articles and any amendments thereto adopted from time to time shall be subject to the approval of the Administration.

"(c) The articles of incorporation and amendments thereto shall be forwarded to the Administration for consideration and approval or disapproval. In determining whether to approve the establishment of such a company and its proposed articles of incorporation, the Administration shall give due regard, among other things, to the need for the financing of small-business concerns in the area in which the proposed company is to commence business, the general character of the proposed management of the company, the number of such companies previously organized in the United States, and the volume of their operations. After consideration of all relevant factors, the Administration may in its discretion approve the articles of incorporation and issue a permit to begin business.

"(d) Upon issuance of such permit, the company shall become and be a body corporate, and as such, and in the name designated in its articles shall have power -

- (1) to adopt and use a corporate seal;
- (2) to have succession for a period of thirty years, unless extended as provided in section

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308(f), or unless sooner dissolved by the act of the shareholders owning two-thirds of the stock or by an Act of Congress, or unless its franchise becomes forfeited by some violation of law or regulation issued hereunder;

(3) to make contracts;

(4) to sue and be sued, complain, and defend in any court of law or equity;

(5) by its board of directors, to appoint such officers and employees as may be deemed proper, define their authority and duties, fix their compensation, require bonds of such of them as it deems advisable and fix the penalty thereof, dismiss such officers or employees, or any thereof, at pleasure, and appoint others to fill their places;

(6) to adopt bylaws regulating the manner in which its stock shall be transferred, its officers and employees appointed, its property transferred, and the privileges granted to it by law exercised and enjoyed;

(7) to establish branch offices or agencies subject to the approval of the Administration;

(8) to acquire, hold, operate, and dispose of any property (real, personal, or mixed) whenever necessary or appropriate to the carrying out of its lawful functions;

(9) to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury;

(10) to operate in such area or areas as may be specified in its articles of incorporation and approved by the Administration; and

(11) to exercise the other powers set forth in this Act and such incidental powers as may reasonably be necessary to carry on the business for which the company is established.

"(e) The board of directors of each small business investment company shall consist of nine members who shall be elected annually by the holders of the shares of stock of the company."

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Section 302 (15 U.S.C.A. § 682) requires that such corporation have a paid-in capital and surplus of at least \$300,000. Section 303 (15 U.S.C.A. § 683) authorizes such companies to borrow money and to issue their debenture bonds, promissory notes or other obligations. Section 304 (15 U.S.C.A. § 684) provides:

"(a) It shall be a primary function of each small business investment company to provide a source of needed equity capital for small-business concerns in the manner and subject to the conditions described in this section.

"(b) Capital shall be provided by a company to a small-business concern under this section only through the purchase of debenture bonds (of such concern) which shall -

(1) bear interest at such rate, and contain such other terms, as the company may fix with the approval of the Administration;

(2) be callable on any interest payment date, upon three months' notice, at par plus accrued interest; and

(3) be convertible at the option of the company, or a holder in due course, up to and including the effective date of any call by the issuer, into stock of the small-business concern at the sound book value of such stock determined at the time of the issuance of the debentures.

"(c) Before any capital is provided to a small-business concern under this section -

(1) the company may require such concern to refinance any or all of its outstanding indebtedness so that the company is the only holder of any evidence of indebtedness of such concern; and

(2) except as provided in regulations issued by the Administration, such concern shall agree that it will not thereafter incur any indebtedness without first securing the approval of the company and giving the company the first opportunity to finance such indebtedness.

"(d) Whenever a company provides capital to a small-business concern under this section, such

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concern shall be required to become a stockholder-proprietor of the company by investing in the capital stock of the company, in an amount equal to not less than 2 percent nor more than 5 percent of the amount of the capital so provided, in accordance with regulations prescribed by the Administrator.

Section 305 (15 U.S.C.A. § 685) provides:

"(a) Each company is authorized to make loans, in the manner and subject to the conditions described in this section, to incorporated and unincorporated small-business concerns in order to provide such concerns with funds needed for sound financing, growth, modernization, and expansion.

"(b) Loans made under this section may be made directly or in cooperation with other lending institutions through agreements to participate on an immediate or deferred basis. In agreements to participate in loans on a deferred basis under this subsection, the participation by the company shall not be in excess of 90 per centum of the balance of the loan outstanding at the time of disbursement.

"(c) The maximum rate of interest for the company's share of any loan made under this section shall be determined by the Administration.

"(d) Any loan made under this section shall have a maturity not exceeding twenty years.

"(e) Any loan made under this section shall be of such sound value, or so secured, as reasonably to assure repayment.

"(f) Any company which has made a loan to a small-business concern under this section is authorized to extend the maturity of or renew such loan for additional periods, not exceeding ten years, if the company finds that such extension or renewal will aid in the orderly liquidation of such loan."

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Section 309 (15 U.S.C.A. §688) provides:

"Any investment company chartered under the laws of any State expressly for the purpose of operating under this Act may with the approval of the Administrator be permitted to operate under the provisions of this Act. Such approval shall be given with due regard to the factors specified in section 301(c) with respect to organization of small business investment companies."

The above provisions fix the basic formation and purposes of a small business investment corporation under the federal act. May such purposes be accomplished by a corporation organized under the Missouri General and Business Corporation law, Chapter 351, RSMo 1949?

Section 351.020, RSMo 1949, provides:

"Corporations for profit except banking, insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

In your opinion request, you state that it appears that a small business investment company would be engaged in the mortgage loan business and therefore could not be incorporated under Chapter 351, RSMo 1949.

It is true that the small business investment company act does contemplate that a corporation organized thereunder should engage in the business of lending money and that such loans might be secured by a mortgage upon the property of the borrower (Sec. 305, supra.) We do not feel, however, that such activity would cause it to be a mortgage loan company within the meaning of Section 351.020, supra. In our opinion, the type of corporation, the formation of which is prohibited by that section, is one which would operate under the scheme provided by Chapter 366, RSMo 1949. Corporations organized under that chapter are expressly authorized to loan money on notes secured by mortgages upon real estate. However, corporations organized under Chapter 366 are also granted further and additional powers not possessed by a general business corporation. The grant to a corporation of authority to lend money to be secured by a mortgage on real estate does not constitute such corporation a mortgage loan company within the meaning of Section 351.020 and Chapter 366 unless such additional and unique authority

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is also granted to the corporation.

That such is the situation seems clear to us in view of the provisions of Section 351.385(8), RSMo 1949, part of the General and Business Corporation law, which confers upon corporations organized under Chapter 351 the power "to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned: * * *."

Except for the fact that it is authorized to lend money on the security of mortgages on real estate, a small business investment company has none of the essential features of a mortgage loan company under Chapter 366. Therefore, we do not feel that Section 351.020 would prohibit incorporation under the Missouri law of a corporation organized to carry on the purposes of a small business investment company.

There are two matters which should be pointed out with regard to your inquiry. Section 301(d)(9) of the federal act, supra, confers upon corporations organized under the federal act the power "to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury; * * *."

Section 362.415(2), RSMo 1949, provides:

"2. No corporation, domestic or foreign, other than a national bank or a federal reserve bank, unless expressly authorized by the laws of this state, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt to be loaned or put into circulation as money."

As above pointed out, Section 351.020 prohibits the organization of banking corporations under Chapter 351, and we are of the opinion that a small business investment company organized under the Missouri General and Business Corporation Act could not be given the power conferred upon federally chartered companies to act as a depository or fiscal agent for the United States.

Another problem arises by reason of the provisions of Section 351.165, RSMo 1949, which prohibits loans by a corporation to its stockholders. Said section provides:

"No note or obligation given by any shareholder, whether secured by deed of trust, mortgage or otherwise, shall be considered as payment of any part of any share or shares, and no loan of money shall be made by the corporation to any

shareholder therein; and if such loan shall be made to a shareholder, the officers making it, or who shall assent thereto, shall be jointly and severally liable to the corporation for the repayment of such loan and interest."

Under the federal act, when the small business investment company furnishes equity capital for a small business company by the purchase of convertible debentures of the small business concern, the issuing company is required to purchase stock in the small business investment company in an amount equal to not less than 2 per cent nor more than 5 per cent of the amount of capital so provided (Sec. 304, supra). The issuing company, therefore, must, upon selling debentures to the small business investment company, become a stockholder in said company. The issuer is not a stockholder at the time of the transaction and the transaction at that time does not partake of the nature of dealings intended to be prohibited by Section 351.165. However, after the original indebtedness has been contracted, subsection (c)(2) of Section 304 contemplates that the issuing concern must first give the small business investment company an opportunity to meet its needs before becoming indebted elsewhere. The transaction which this provision contemplates might involve the provisions of Section 351.165, although the possibility exists that it might be considered an investment rather than a loan. Such distinction is recognized in the banking field. See Sections 362.105 and 362.170, RSMo 1949. Should a transaction under Section 305 of the federal act be contemplated following the completion of a transaction with the same concern under Section 304, the provisions of Section 351.165 would clearly be involved and would prohibit the transaction. This possibility would not, however, in our opinion justify the Secretary of State's refusal to issue a certificate of incorporation when the articles of incorporation are otherwise in proper form. The rule in this regard is stated in 18 C.J.S., Corporations, Section 59, page 443, as follows:

"Under some statutes, application must be made to the governor, secretary of state, or other officer for approval by him of the articles, certificate, or charter, or which provide for the filing of the articles, certificate, or charter with the secretary of state or other officer, and expressly or impliedly permit him to refuse to file the same if it is not in proper form or does not come within the statute. Under such a statute, the secretary of state or other officer, although generally a ministerial officer, is clothed with a quasi-judicial judgment, and he may and should refuse to approve articles or a certificate or charter if it is not in proper form and not in

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accordance with the statutory requirements; if it is for a purpose which is unauthorized by the statute or contains unauthorized provisions; if it is for an unlawful purpose or contains unlawful provisions; or where it plainly appears from the charter itself that the functions of the proposed corporation are impossible of performance. If, however, the proposed articles, certificate, or charter is in proper form and is for an authorized and lawful purpose, he generally is bound to approve the same, although there is an apprehension that applicants contemplate doing something in violation of the law, or may perform acts ultra vires. In such a case his duties are purely ministerial, and he cannot go outside of the application and proposed charter and determine disputed questions of fact on the evidence, but such questions must be left for the courts after the charter has been granted.* * *" (Emphasis ours.)

Under Section 351.060, RSMo 1949, the Secretary of State is required to issue a certificate of incorporation if he "finds that the articles of association conform to law." We do not believe that this would authorize his refusal to approve articles of incorporation on the grounds that powers conferred therein might be abused when such power is not on its face contrary to law.

What effect the limitation of Section 351.165 might have upon federal approval of a corporation organized under Missouri law would be a matter for the federal administrator to determine.

With your opinion request you submitted a form of proposed articles of incorporation which merely sets forth in general terms that the corporation shall have the authority conferred upon small business investment companies by the federal act, except insofar as they are contrary to Missouri law. It would appear that the Secretary of State could properly require a specific statement of the purposes of the corporation proposed to be organized, so that reference to the federal law would not be necessary in order to ascertain the extent of the authority conferred.

CONCLUSION

It is the opinion of this office that a corporation may be organized under the General and Business Corporation Act of Missouri (Chapter 351, RSMo 1949) for the purpose of conducting

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a small business investment company under the Federal Small Business Investment Act, but that a corporation so organized may not be authorized to act as a depository or fiscal agent of the United States.

The foregoing opinion, which I hereby approve, was written by my Assistant, Paul N. Chitwood.

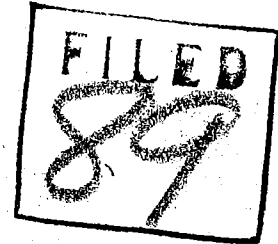
Very truly yours,

John M. Dalton
Attorney General

PNC/ld

ELECTIONS: Declarations of candidacies for nomination to circuit judge-
ships in divisions three or four of the 13th judicial cir-
cuits prior to redesignation of said judicial circuit as the
twenty-first judicial circuit by S.B. 96, 70th General Assem-
bly, should be considered as filed for offices in the 21st
judicial circuit, and should be so certified by the Secretary
of State.

September 14, 1959



Honorable Walter H. Toberman
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri

Dear Mr. Toberman:

This opinion is in reply to your inquiry reading as follows:

"This office respectfully requests an opinion
based on the following facts:

"Senate Committee Substitute for Senate Bill
Number 96, enacted by the 70th General Assem-
bly, approved by the Governor on June 12, 1959,
changed the numbering of the 13th judicial
circuit. The 13th circuit is now numbered the
21st circuit. Our question is this:

Is it necessary for candidates who
have already filed for election in
the 13th circuit to refile as a
candidate from the 21st circuit?

Also, should the candidates be cer-
tified to the Election Board from
the 13th or 21st Circuit?"

Section 478.117, RSMo 1949, which designated the County of
St. Louis as the thirteenth judicial circuit in Missouri was re-
pealed outright by Section 1 of Senate Bill No. 96, passed by the
70th General Assembly of Missouri and effective August 29, 1959.
Section 478.140 of Senate Bill No. 96 provides:

"478.140. Circuit number twenty-one shall
consist of the county of St. Louis."

We find no change in geographical boundaries effected in the
former thirteenth judicial circuit by its redesignation as the
twenty-first judicial circuit.

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Declarations of candidacies for nomination to circuit judgeships in St. Louis County are filed under Section 120.340, RSMo 1949, providing as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (..... precinct of the town of), or (the..... precinct of the ward of the city of), or the precinct of township of the county of and state of Missouri, do announce myself a candidate for the office of on the ticket, to be voted for at the primary election to be held on the first Tuesday in August,, and I further declare that if nominated and elected to such office I will qualify."

Section 478.010, Para. 4 of Senate Bill No. 96, supra, provides:

"4. In judicial circuit number twenty-one, the judges of divisions one, two, seven and eight shall be elected in 1964, the judges of divisions three and four shall be elected in 1960 and the judges of divisions five and six shall be elected in 1962."

A review of the declaration of candidacies referred to in the request for this opinion has been made and they disclose that the candidates filing declarations of candidacies for circuit judgeships to be filled in 1960 have designated either division three or four as the office they seek in the thirteenth judicial

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circuit. Thus, it appears that the candidates filed for the particular judgeships to be filled in 1960. The renumbering of the judicial district from number thirteen to number twenty-one, without change in geographical boundaries from those embracing St. Louis County subsequent to the time the declarations in question were filed with the Secretary of State, will not cause those declarations to be improper in contents, nor should they be considered filed out of time.

It is peculiarly within the knowledge of the Secretary of State that the former thirteenth judicial circuit has been renumbered without changing its geographical limits or making a change in the circuit judgeships to be filled in that judicial circuit in 1960. Under Section 120.380, RSMo 1949, the duties of the Secretary of State are found in the following language:

"At least eighty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and post office address of each person who shall have filed declaration papers in his office and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate and the party or principle he represents."

When the Secretary of State accomplishes the task outlined in the preceding statute, he should certify the candidates in question as having filed for circuit judgeships in the twenty-first judicial circuit.

CONCLUSION.

It is the opinion of this office that declarations of candidacy filed with the Secretary of State of Missouri for nomination in 1960 for circuit judgeships in divisions three or four in the thirteenth judicial district comprising the whole of St. Louis County, prior to the effective date of Senate Bill No. 96 of the 70th General Assembly of Missouri, should be considered as and for declarations of candidacy for such circuit judgeships in said judicial circuit which has been renumbered the twenty-first judicial circuit of Missouri, and the Secretary of State should so certify such declarations under Section 120.380, RSMo 1949.

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The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

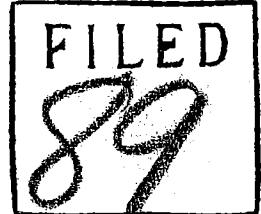
John M. Dalton
Attorney General

JLO:M:cm

SCHOOLS:
SCHOOL DISTRICTS:
COUNTY COURT:

County court may not attach unorganized
territory to school district not contiguous
thereto.

December 16, 1959



Honorable Francis Toohey, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Mr. Toohey:

This is in response to your request for opinion dated
November 16, 1959, which reads as follows:

"This is to seek an opinion from your
office as to the construction of Section
165.167 of the Revised Statutes of
Missouri for the year 1949. We have in
our county an area of approximately six
sections of land which is unorganized
territory. For the past several years
the Perryville School District has been
accepting these pupils for the sixty-five
cents a hundred that the county levied in
such district. The Perryville School
District accepted these pupils at the be-
ginning of the present school term. Within
the past few weeks the School Board of the
Perryville District has advised the parents
living in such territory that it will col-
lect the tuition from the parents and if
the parents refuse to pay will not permit
their children to attend the Perryville
Schools.

"The parents are willing to file a petition
to be assigned to a district as is provided
by Section 165.167. The adjacent common
districts are overcrowded and have not
budgeted for these children. In addition
these districts, although bordering on the
territory, are not very accessible for these

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children. In some cases the children would have to travel through Perryville to reach the adjacent school house.

"The Perryville District has indicated that it would accept the territory. Thus the following questions arise:

1. May the county court, upon the filing of a petition as provided in Section 165.167, if it finds that the Perryville School District is the most available and nearest district, although not contiguous to the territory, assign such pupils to such district?

2. Should the terms nearest and most available be construed together and if so may the Perryville District be construed as the nearest and most available district where the Court is advised that the nearer districts are not directly accessible to such children and that from a mileage and transportation standpoint the Perryville District is the more accessible? May the fact that an adjacent school district is overcrowded with its present enrollment be taken to mean that said district is not the most available?

3. If the court should find that the Perryville District was the nearest and most available, may such area be attached to the Perryville District although no part of the district touches the unorganized territory?"

The statute applicable to this problem is Section 165.167, RSMo 1949, which reads as follows:

"Whenever there shall be in this state any territory not organized into a common, town or city school district, and not containing within its limits twenty or more pupils of school age, any three or more taxpayers in such unorganized territory, or in any adjacent common, town or city school district, may file a written petition in the office of the clerk of the county court praying that such unorganized territory shall be

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attached to the nearest and most available common, town or city school district, and at the next meeting of the county court the said petition shall be taken up and heard by the court, which shall, after being duly informed and advised, make an order annexing such territory to the nearest and most available common, town or city school district, and thereupon such territory shall become a part of such district, which fact shall be duly entered by the proper officers upon the tax books and other records of the county."

At the outset, we are faced with the proposition that neither this statute nor any other general statute expressly requires contiguity in the formation of school districts. The special statutes relating to annexation (§165.300 to 165.307, RSMo, C.S. 1957) and consolidation (§165.273, RSMo 1949), etc., do require that the land being annexed or consolidated must be "adjacent" or "adjoining," but the language used here is "nearest and most available" district.

As you have pointed out in your opinion request, the nearest school district, which of necessity would be one adjacent to the unorganized territory, is not necessarily the most available from the standpoint of transportation, etc. This language then being somewhat ambiguous is subject to construction, and we must arrive at its meaning through application of general principles of law and judicial decisions relative thereto.

In 78 C.J.S., School and School Districts, Section 31(b), page 686, we find the following:

"It has been held that, unless otherwise expressly provided by statute, a school district must consist of contiguous bodies of land or territory, and that it cannot include two or more detached tracts or territories, separated from each other by intervening territory not a part of the district. In other instances, constitutional or statutory provisions require contiguity, or compactness and contiguity, of the territory of which a school district

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is composed, or require territory sought to be attached to a district to be adjacent thereto. On the other hand, under some statutes, it is expressly provided that a school district or other local school organization need not consist of connected, contiguous territory, and there is authority for the view that it is not necessary, in the absence of a statute providing otherwise.
* * *

From this we see that the courts have taken two opposite stands, the vast majority holding that, in the absence of a statute expressly so providing, a school district cannot be formed of noncontiguous areas. On the other hand, at least one court has taken the opposite view. See *Weeks v. Batchelder*, 41 Vt. 317, wherein it was held that, in the absence of a statute requiring contiguity, a school district could be formed of two areas detached from each other and completely separated by intervening lands. This is the only case we have found, however, adopting this view.

There are no Missouri cases squarely on the point. However, the St. Louis Court of Appeals, in *State ex rel. Taylor v. Schwerdt, et al., v. Reorganized School Dist. R-3, Warren County, et al.*, Mo. App., 257 SW2d 262, clearly indicated which line of decisions it would follow on this question. In that case a petition had been presented for release of one part of the R-1 District to R-3 and another part of R-1 to the Hermann District. The two were submitted as one proposition and the question was whether this was proper or whether they should have been submitted as separate and independent propositions. In discussing this phase of the case the court said, l.c. 267:

" * * * If the two propositions had been submitted on separate ballots and the proposition to release the middle section of the district had carried and that territory had been accepted by the board of directors of District R-3, while the proposition had failed as to the release of the western end of the district, an anomalous and irreconcilable situation would have resulted, for in that event the district would have been divided into two separate and non-contiguous areas. In proceedings to release

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parts of school districts for annexation to other districts, the law does not contemplate that two portions of a district should be left entirely segregated from each other. See *Howell v. Kinney*, 99 Ga. 544, 27 S.E. 204, and *Chicago & N.W. Ry. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607. Paraphrasing, the dissenting opinion in *State ex inf. Barrett ex rel. Callaghan v. Maitland*, 296 Mo. 338, 246 S.W. 267, loc. cit. 275, (which dissent was declared to be the law in the later case of *State ex rel. City of St. Louis v. Hall*, supra, 75 S.W. 2d loc. cit. 581), sound public policy required that the proposition to release the two areas be linked inseparately, and the very reasons which argue against doubleness in submitting proposals argue for the submission of these two questions in one proposition and one ballot. To submit them separately would surely invite an administrative and procedural impasse."

It should be borne in mind that there is no statute expressly requiring that the district, as it remains after the release of territory to another district, must consist of a contiguous area.

The court cited *Howell v. Kinney*, 99 Ga. 544, 27 SE 204, and *Chicago and N.W. Ry. Co. v. Town of Oconto*, 50 Wisc. 189, 6 NW 607.

The Georgia case involved annexation of certain areas to a militia district. On this question the court said, SE 1.c. 207:

"If the proceedings above referred to were to be treated as having the effect, as contended by plaintiffs, of transferring to the Ridge Valley district the numerous tracts of land embraced in the several petitions presented to the board of county commissioners, two anomalous results would follow. The first of these is that in some instances an isolated portion of the territory of a district other than the Ridge Valley district would be added to the latter, although, in point of fact, such territory nowhere touched or was contiguous to any portion of the Ridge Valley district. The second is that it would

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in one instance have happened that two portions of a district other than the Ridge Valley district would be left entirely segregated from each other. We feel certain that the law authorizing changes to be made in militia district lines never contemplated such gerrymandering as this. As demonstrating the correctness of this proposition, we content ourselves with presenting a diagram which illustrates the situation, and is of itself sufficiently convincing to need no argument in its support.

[Diagram omitted.]

"The shaded space marked R, constituting a part of the Rome district, represents territory sought to be transferred to the Ridge Valley district, leaving the two remaining portions of the Rome district entirely segregated."

The Wisconsin case involved the validity of taxes levied upon certain areas by the town of Oconto, the contention being that previous actions of the town board of supervisors attaching these areas to the town were void because they were not contiguous to the main body of the town. The court, after a lengthy discussion, sustained this contention and said, NW 1.e. 609:

"Supported by these authorities, as well as most obvious and numerous reasons of public policy, practical convenience, and respecting the public welfare, we decide that a town must consist of contiguous territory."

To the same effect, see *Cole v. City of Watertown, S. Dak.*, 147 NW 91, 93; *State ex rel. Bibb et al. v. City of Reno et al.*, Nev., 178 P2nd 366, 370; *Hillman v. City of Pocatello, Idaho*, 256 P2nd 1072, 1073.

See also *City of Denver v. Coulehan, Colo.*, 39 P. 425, 428, where the court said:

"Legislative acts in the matter of extending the boundaries of municipal corporations are to be interpreted and applied according to

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the essential nature as well as the subject-matter of such legislation. In the nature of things, there must be some limit to legislative power. For example, the legislature cannot extend the municipal boundaries of a city into another state. Legislative acts upon such a subject would have no extra-territorial force. There are some things that in their very nature cannot be accomplished by any human power. A thing cannot be made to exist as a whole and in broken disjointed fragments at one and the same time. A thing essentially single in its nature cannot have a plural existence. Every municipality must have its territorial corpus, in which to exercise its corporate functions and powers. Such corpus may be enlarged or diminished by the action of the legislature. So the human body may grow or diminish by the action or nonaction of its vital forces; but neither the human body nor the municipal corpus loses its identity, its individuality, or its unity by such growth or enlargement. It is a misnomer - a solecism - to speak of a growth of the human body not connected with the body itself. Such a growth is, in fact, not of the body. So, territory not in fact connected with or adjacent to a city cannot be regarded as a part of the municipal corpus, or as an addition thereto, in any true sense of the term. * * *

In the case of *Petitioners of School Dist. No. 9, Caddo County, v. Jones, Okla.*, 140 P2d 922, 924, the Oklahoma Supreme Court said:

"It is common knowledge that school districts, judicial districts, legislative districts, incorporated towns, cities and counties are composed of one body of land. In the face of all the indications to the contrary we cannot attribute to the Legislature any intention on its part that a school district should ever be composed of nonadjacent units or integral parts where it made no specific provision therefor. Likewise it never intended that an existing school district

Honorable Francis Toohey, Jr.

should be divided into separate and distinct noncontiguous parts by the annexation of a portion, or portions, thereof to another district. You cannot accomplish indirectly that which cannot be effected directly."

See also Independent School Dist. No. 66, Pottawatomie County, v. Dependent School Dist. No. 62, Pottawatomie County, Okla., 259 P2d 826.

Although it is well recognized that school districts, cities and other municipal corporations are creatures of the Legislature and their boundaries may be established as the Legislature directs, at least one court has questioned the power of the Legislature to create such entities of divided and unconnected parts (City of Denver v. Coulehan, supra). On the other hand, it was pointed out in the case of Petitioners of School Dist. No. 9, Caddo County, v. Jones, supra, that in Oklahoma for unusual situations some statutes do expressly authorize such procedure. The authority to do so was not questioned by the court.

We are not prepared to say that the Legislature could not authorize the creation of public corporations consisting of non-contiguous areas, but we need not decide that issue here.

In view of the fact that the only Missouri case on the subject (State at Inf. of Taylor ex rel. Schwerdt v. Reorganized School Dist. R-3, Warren County, supra) cites and follows the line of cases which at least presumes that a school district or other public corporation will consist of contiguous territory unless the Legislature has expressly directed otherwise, we are of the opinion that the words "nearest and most available" are not sufficient to indicate a legislative intent to authorize the creation of a school district consisting of detached areas and that the word "nearest" must be held to mean an adjacent school district. Inasmuch as several districts are equally near in this instance, the only factor which the county court could consider would be availability.

We find it difficult to answer any of your three questions precisely because they seem to be based upon the assumption that the county court could find the Perryville District to be the "nearest" district. On the contrary, we do not think the court would have this authority because it is, in fact, not the "nearest" district. Therefore, because of the basic concept of a school

Honorable Francis Toohey, Jr.

district as consisting of a contiguous area and the use of the word "nearest" in the statute, we must conclude that the county court could not attach the unorganized territory to the Perryville District.

In determining the availability of a school district, the county court should be guided by the same principles that govern the action of a county superintendent of schools in assigning pupils under Section 165.253, RSMo, C.S. 1957. There, the word used is "accessible," but we believe that for this purpose the two words "available" and "accessible" are roughly synonymous. For the guidance of the court, we are enclosing copy of an opinion written for Honorable Phil Hauck, dated April 16, 1959.

CONCLUSION

It is the opinion of this office that a county court acting under Section 165.167, RSMo 1949, may not attach unorganized territory to a school district which is not contiguous thereto.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

CERTIFICATE OF TITLE:
AUTOMOBILE TITLE:
SALES:

A buyer of an automobile may, by his actions, create an agency relationship between himself and the seller of an automobile so that a valid transfer results when the dealer submits the title and the application for transfer to the Department of Revenue even though the certificate of title was never physically in the hands of the buyer.



March 2, 1959

Honorable James G. Trimble
Representative, Clay County
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Trimble:

You recently requested an opinion from our office on the validity of certain automobile transactions as follows:

"Please render an opinion at your earliest convenience on Section 301.210 R. S. Mo. 49, Section 4, relating to the sale and transfer of vehicles which provides as follows:

4. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void.
(8382, A. L. 1947 V. I p. 380)

"At the present time it is the practice of many automobile dealers to send the Certificate of Ownership to the Department of Revenue for the purchaser instead of delivering the Certificate to the purchaser. Does

Honorable James G. Trimble

this delivery to the Director constitute a sufficient assignment under this Section to make a valid sale?"

In a private conversation, you indicated the presence of certain other facts in these transactions. The facts are as follows:

1. An individual agrees to purchase an automobile from a dealer.

2. At the time the purchase is made the dealer assigns the certificate of title and the buyer signs an application for new title, pays the sales tax and turns the application for new title over to the dealer. The dealer then, after informing the buyer as to what he intends to do, forwards all necessary papers to Jefferson City and thereafter a title is issued in the buyer's name and returned either to the dealer or the note holder.

3. The buyer does not, at any time, have actual physical control of the certificate of title. He does, however, willingly turn over to the dealer the application for transfer of title and he does, for his own convenience, pay to the dealer the amount of tax involved, either by having this amount added to his indebtedness or by paying in cash. The buyer knows what the dealer is going to do with the title papers and further that it is the dealer's intention to have the title made out in the buyer's name and hold it until such time as the dealer or note holder is paid in full.

There has been a considerable degree of litigation involving Section 301.210, subsection 4, and its application to automobile transactions. First of all, this section applies by its terms only to motor vehicles that are registered under the laws of the State of Missouri and subsequently sold. A reading of the cases would seem to require that the seller deliver to the buyer a properly assigned certificate of title at the time of the transfer in order to properly and validly pass title to the automobile.

In *Allstate v. Hartford*, 311 S.W. 2d 41, 1.c. 46, subsections 2 and 3, we find the following language:

"[2, 3] Turning now to the Missouri motor vehicle law, we find that under section 301.210 RSMo 1949, V.A.M.S., it is unlawful to buy or sell any motor vehicle

Honorable James G. Trimble

registered in this state unless 'at the time of the delivery' there shall pass between the parties a certificate of title and the sale without such assignment 'shall be fraudulent and void.' The provisions of this act are essentially a police regulation of the highest type and absolute technical compliance is necessary. Such provisions are rigidly enforced and there are no exceptions to conform to intentions. Unless and until the assignment of the certificate of title is filled in, acknowledged, and delivered to the purchaser, no title passes. And the buyer acquires no right of possession and user against the seller, who may repudiate and tender back the consideration. * * *

This case, however, turns on the failure to assign title and not the failure to deliver a properly assigned title. The court cites Kesinger v. Burtrum, 295 S.W. 2d 605, as authority for the necessity of assignment and delivery but this case is also a case where the title was never assigned or delivered.

Mathes v. Westchester, 6 S.W. 2d 66, is also cited as authority for this proposition but in this case the title was signed and not acknowledged and kept in the seller's possession and, of course, not transferred by the state.

Robertson v. Central Manufacturers' Mutual Insurance Company, 239 Mo. App. 1169, 207 S.W. 2d 59, is also cited. In this case a Texas car dealer purchased automobiles from a Missouri car dealer and the assigned titles were attached to the draft so that when the draft was honored the Texas car dealer would then come into possession of the properly assigned titles. The court concluded on the set of facts surrounding this transaction that title had not passed because the parties had agreed that delivery would be made of the cars in Texas and that payment and delivery of the titles would be made in Texas also.

In Anderson v. Arnold-Strong Motor Company, 88 S.W. 2d 419, the title involved was neither assigned nor delivered. The court has taken up this matter also in the case of Robinson v. Poole, 232 S.W. 2d 807, a case where "A" sells a car to "B" and before the papers are sent to Jefferson City "B" sells the car to "C" with the understanding that when the

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papers are sent to and returned from Jefferson City "B" will assign the title to "C" and then re-submit for proper titling in "C's" name. This situation also in essence is one of sale without assignment or delivery. The court, however, in each of these cases and in all of the cases that were found on this subject recites the need for assignment and delivery of the certificate of title and further of the need of strict compliance with the statute. The reason for such a statute is discussed in Robinson v. Poole, 232 S.W. 2d 807, 1.c. 812, where the court says as follows:

"***The requirement that a sale of a motor vehicle registered in this state must be accompanied by an assignment of the certificate of ownership is absolute and mandatory because the statute provides that any such sale without such assignment is 'fraudulent and void.' Compliance with the statutes protects not only the parties to a particular sale or transfer but also protects the public generally by enabling the State to keep an up to date registry of all automobiles registered in this State and their ownership, thereby making traffic in stolen automobiles as difficult as possible."

Under the facts as given, the title papers would be submitted immediately by the dealer to the state and a proper title issued and returned by the state in the buyer's name to be held by the note holder or seller. The purpose of this law as stated above is fulfilled under the facts of this transaction since the state's records are kept complete and accurate through the proper assignment of title in this case. The buyer in this instance is treated fairly and protected in that the automobile which he purchased is properly transferred to his name and the seller is protected by this transfer and the payment of the necessary tax since the title is returned to him in proper form and he is assured that the transfer is made as the law requires and that he may repossess the car since the car is properly in the buyer's name.

In other words, all parties in this transaction, insofar as the records show, are exactly where they properly should be. There is no question that Missouri courts in the herein cited cases and others have stated frequently that assignment and delivery are both needed to complete a transaction of this nature. These statements were made, however, in every instance when in fact there had been no proper assignment or where the

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agreement between the parties was that the transaction was not to become complete until delivery of the title. No case was found directly in point on this factual situation.

Some question might arise as to the propriety of this transaction since the title is not ultimately in the buyer's hands but in the hands of the note holder or seller. In *Wilson Motor Company v. Jenkins*, 284 S.W. 190, the court had occasion to pass on such a situation and the holding was that where there was ample evidence to prove a proper certificate of title was duly transferred and thereupon, with the knowledge and consent of the buyer, turned over to the note holder, the procedure was proper. We feel, therefore, that in this case the fact that title is ultimately to be delivered to the mortgage holder or seller does not work to void this transaction.

We must then determine what effect the failure to physically deliver the title has in a situation where all the rest of the transaction is regular on its face and where there is no taint of unfair dealing by any party. We feel that a court faced with such a situation would be inclined to uphold such a transaction if such a decision were possible under the laws of the state. We feel further that the parties by their action have created an agency relationship in which the dealer acts as the agent of the buyer, in sending the necessary papers to Jefferson City and in securing a proper title in the buyer's name. The agency relationship does not need to be intentionally or explicitly created in order to function under the law. The Supreme Court has used the citation from American Jurisprudence in defining agency under Missouri law. This citation is found in 260 S.W. 2d 504, in the case of *Leidy v. Taliaferro*, l.c. 505, and reads as follows:

"***'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' Restatement, Agency, §1. The parties may not have intended to create the legal relationship or to have subjected themselves to the liabilities which the law imposes as a result of it, nevertheless, the relationship exists 'if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.' ***"

It is our feeling that the buyer, in handing the application for transfer and in paying to the dealer or in becoming obligated to the dealer to pay the tax on this transaction with

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the understanding that the dealer is to send the papers to Jefferson City and secure title in the buyer's name, appoints the dealer as his agent for the procurement of this title and, therefore, the transaction is not fraudulent and void under the terms of Section 301.210, RSMo 1949, subsection 4.

CONCLUSION

A buyer of an automobile may, by his actions, create an agency relationship between himself and the seller of an automobile so that a valid transfer results when the dealer submits the title and the application for transfer to the Department of Revenue even though the certificate of title was never physically in the hands of the buyer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON
Attorney General

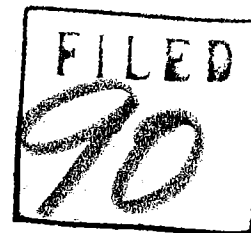
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NON-PARTISAN BOARDS:
POLITICAL PARTIES OR
PARTY MEMBERSHIP:
REMOVAL FROM NON-
PARTISAN BOARDS:

An individual's political affiliations are determined by his actual manifestations or professions of loyalty to a political party, not merely his professed loyalty to one party. Where a non-partisan board contains an excess of members from any one party, its acts are not invalid, third parties and the general public are protected. Where there is an excess of members from any one party on a non-partisan board contrary to law, the defectively appointed member may be removed in a direct proceeding challenging the title to his office.

July 22, 1959

James G. Trimble, Member
Missouri House of Representatives
Route # 1
Kearney, Missouri



Dear Sir:

On June 4th, 1959, you requested that we submit answers to three questions relating to the membership of non-partisan boards. Your inquiry reads as follows:

"I would appreciate your office rendering an opinion on certain statutes requiring that members of boards and commissions be appointed on a non-partisan basis.

"I would like to know:

"1. How do you determine to what party an individual belongs;

"2. Are the actions of the boards invalid if there are too many of one party appointed to it; and

"3. If too many of one party are serving on a non-partisan board, should some be removed, if so, what is the procedure.

"Your attention to this matter will be greatly appreciated. If you need additional information, please let me know."

In extensively reviewing the applicable law on these questions for precedents and authority, it appears that questions of membership in political parties by its individual members or disloyalty thereto after attaining appointment to office have not been extensively passed upon.

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Accordingly, we shall answer your questions categorically as these authorities seem to indicate the law. FIRST: How do you determine to what party an individual belongs?

In attempting to answer what the criteria of party membership really is, there are no clear measuring factors to pinion party loyalty in terms of rigid standards. Each individual's make-up determines what his loyalty is to be and others who sit in judgment have only his outside manifestations in making their decision as to his party loyalty.

New York, by statute, has made provision against infiltration of a political party by members of other political parties posing as members of the party infiltrated. This provision in Section 137 of the New York election laws, as found in 17 McKinley's Consolidated Laws of New York Annotated, places a limitation on the right to designate or nominate party candidates. Two cases construing this provision and which seem pertinent to the question at hand, i.e., party membership, are Werbel vs. Gernstein, 78 N.Y.Supp. 2nd 440; 191 Misc. 275, affirmed 78 N.Y.Supp. 2nd 926; 273 App.Div. 917; and In re Mendelsohn, 99 N.Y. Supp. 2nd 438; 197 Misc. 993, affirmed Mendelsohn vs. Walpin, 98 N.Y.Supp.2nd 1022; 277 App. Div. 947; appeal transferred 98 N.Y.Supp. 2nd 660; 277 App. Div. 946; affirmed 94 Northeastern 2nd 254; 302 N.Y. 670.

In Werbel vs. Gernstein, 78 N.Y.Supp.2nd 1.c. 441 and 443:

"[1] A condition of membership in a political party is the sympathy with its principles and the purpose of fostering and effectuating them.

"Examination may not be made into the hearts and minds of people to ascertain their thoughts and sympathies. Deceit often indicates that words do not truly disclose true thoughts and sentiments. But actions often belie words. In this case, it is more the actions of the respondents rather than their words which indicate their true political sympathies."

This philosophy was also followed in In re Mendelsohn, 99 N.Y. Supp. 2nd, 1. c. 445, wherein the New York courts said:

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"[8] In so holding I do not mean that a voter may not change his party as he sees fit; that he may not enter a party for the sole purpose of seeking nomination and election; that he may not disagree with the party in its choice of candidates; that he may not criticize the party leadership and try to change it; or that he may not even oppose candidates of the party in an election. He may do any or all of these things and still remain a member of the party provided he is in reality in sympathy with its principles. But where, as I think it has been conclusively shown here, a man is not in reality in sympathy with the principles of a party he is not entitled to enroll in order to further his ulterior motives."

Naturally, in this regard, each situation must be judged in itself as to whether there has in fact been a change in actual political loyalty in contrast to the professed loyalty affiliations. It is well known that there are conservative and liberal elements in every major political party. At times, these elements seem to be more closely allied with other factions or the general spirit of opposing parties, but yet these people can be truly said to be members of the party with which they profess to belong. Their interpretation of a party's basic philosophy may differ.

Certain standards do emerge -- active participation in the party's affairs, contributions to its cause, registering and voting as an active partisan, etc., none of which are determinate in themselves. The individual's overall actions must be examined. On one other occasion has this office had the opportunity to discuss a similar though not synonymous question of party affiliation. Feeling this opinion may also be of help to you, we are enclosing for your information our opinion of October 29th, 1954, to the Honorable Michael J. Doherty which discusses the question of what constitutes "political activity."

See also Section 36.150, RSMo, which sets out certain criteria which can be used to some extent as standards of political affiliations and activity.

SECOND: Are the actions of the boards invalid if there

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are too many of one party appointed to it?

Where an appointee has received an apparently valid appointment and enters into the duties of the office, he falls within the doctrine of de facto officers. This rule is applicably stated in 43 American Jurisprudence, Public Officers, Section 470, which we quote in part:

"The de facto doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

As to appointive officers in particular, 43 American Jurisprudence, Public Officers, Section 481, reads as follows:

"One of the important classes of de facto officers consists of those who enter into possession of an office and exercise its functions by reason of an appointment which is informal or defective. As already seen, the defective appointment constitutes color of title or color of appointment. Therefore, the general rule is that when an official person or body has apparent authority

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to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner. Accordingly, it has been held that persons are officers de facto where, although their appointment was without authority, they were duly commissioned, and discharged the duties of their offices, and were generally recognized as legally constituted officers, and that so long as one assumes to act in an official capacity under a commission from the governor, although issued without authority, he is a de facto officer."

See also in this regard *State ex rel. City of Republic vs. Smith*, 345 Mo. 1158, 139 S.W. 2nd 929; *Forwood et al. vs. City of Taylor*, Civ. App., 208 S.W. 2nd 670; rehearing denied 209 S.W. 2d 434; affirmed 147 Texas 161, 214 S.W. 2nd 282.

It is clear then that an appointive officer whose appointment is either void ab initio or who forfeits his appointment while in office, but who assumes the duties of the office and actually acts in performing these duties is a de facto officer and that third parties and the public are protected from his acts. An attack on an officer's right to hold office must be a direct attack by quo warranto proceedings or a statutory removal proceeding. It cannot be attacked collaterally in another proceeding. In *Hutchins vs. Pacific Mutual Life Insurance Company of California*, 20 Fed. Supp. 150, affirmed C.C.A., 97 Fed.2nd 58, an Insurance Commissioner had been appointed by the Governor of California and confirmed by the California State Senate, but was not legally eligible for the appointment. His official acts were sought to be set aside on the grounds of his defective appointment. The court refuted this collateral attack as follows, at 1.c.152-153:

"[8] Second, assuming this court could review the Commissioner's power to act and his right to hold office, it could be done only in quo warranto proceedings where the

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attack was direct. Here, the main relief asked is that the court order reconveyance of transferred assets and that an equity receiver be appointed. The Commissioner's power to file the petition in the state court against the insurance company is questioned only collaterally. The rule is that suit must be brought directly, not only against the Commissioner, but also for the purpose of testing his title to office, otherwise his acts as de facto commissioner are valid.

"* * * There is no reason to depart from the general rule that the acts of a de facto officer are valid until such time as it is judicially determined he has no legal right to his office. * * *"

THIRDLY: If too many of one party are serving on a non-partisan board, should some be removed, if so, what is the procedure?

In State ex rel. Harvey vs. Wright, 251 Mo. 325, 158 S.W. 823, Ann. Cas. 1915A 588, the Missouri Supreme Court en banc, in quo warranto proceedings, had occasion to pass upon the question of removal of an appointee who professed to be of one political faction at the time of his appointment to a non-partisan board, though he was in reality a member of another political faction. A writ of ouster was issued on the basis of his appointment being invalid when made. The court stated the rule in relation to removal from a non-partisan board in such instance, l.c. 827 and 828:

"[7] III. Respondent insists that the Governor in appointing him and the Senate in confirming him 'determined a political question after an inquiry imposed by law,' and that therefore such action foreclosed judicial inquiry. The authorities urged upon us as upholding this view are cases where this court refused to control by mandamus the political and ministerial discretion of the executive by compelling him to issue commissions, or to do other acts strictly pertaining to the duties of the executive as a member of a co-ordinate branch of government.

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"If by this contention respondent means that, as a matter of law, we may not go behind the commission of the Governor, we answer that this point is fairly well settled by the case of State ex rel. v. Vail, 53 Mo. 97. In the above case the authorities purport to be reviewed in so far as this state is concerned, and they were said to be on this point 'conclusive on this court'. State ex rel. v. Vail, 53 Mo. loc. cit. 109; State ex rel. v. Bishop, 44 Mo. 229; State ex rel. v. Hays, 44 Mo. 230; State ex rel. v. Steers, 44 Mo. 225; State ex rel. v. McAdee, 36 Mo. 453; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636.

"In the case of State ex rel. v. Steers, supra, Wagner, J., said: 'A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is unlawful holding, and he may be ousted at the instance of the state, notwithstanding his commission. Bashford v. Barstow, 4 Wis. 567.' Changing merely the words 'election' and 'elected' to 'appointment' and 'appointed,' what is said above fairly well applies to the instant case.

"[8] If, on the other hand, respondent has reference to a question of fact when he insists that the determination of the Governor and Senate conclude us, the answer may well be that this would be true if the record were silent as to the political affiliation of respondent. The condition would then, however, arise from the entertaining of a presumption, rather than from the application of any inherent doctrine allied to that 'divinity which doth hedge a king.' We have in the record, however, the clear-cut charge that respondent is a member of the Progressive party, as well as his frank admission of the truth of this charge. Can we say in the light of this that respondent is a Republican? Would it not be

James G. Trimble

tantamount to saying that black is white? While appointments to office have been known to change the political complexion of men, respondent stands here solemnly averring that he has not been so affected. Relator inquires with some considerable degree of pertinence whether, if the Legislature had required the appointment of a male to this office, and the Governor had appointed and the Senate had confirmed a female would 'she' have become a male, ipso facto, to the extent of precluding judicial determination of the fact? We think not, though conceding that if the record were silent on this point of party or of sex, a Progressive might be changed to a Republican and a female to a male, within the law's purview from the application of the presumption of 'right and solemn performance of a duty enjoined'." (Emphasis ours.)

CONCLUSION

1. It may be determined to what party an individual belongs by his outward manifestation of loyalty to a party and in so judging the evidence must clearly indicate that his loyalty is other than that professed, otherwise, his profession of loyalty of party affiliation should be accepted.

2. Acts of a non-partisan board where an invalidly appointed member (by reason of political affiliation) acts as a de facto board member, the board's action is not invalid by reason of a de facto member's participation as to third parties and the public. Title to his office must be challenged directly through quo warranto proceedings or by a statutory removal proceeding and it cannot be challenged indirectly in a collateral proceeding.

3. Where too many members of one political faction are on a non-partisan board contrary to statutory requirements, the defective appointment or appointments may be

James G. Trimble

challenged in direct proceedings for their ouster.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

JBB:eatle

1 enclosure

TAXATION AND REVENUE:

Property acquired by county under provisions of Section 205.010 for county health center purposes is exempt from taxation.

March 24, 1959



Honorable Earl L. Veatch
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Mr. Veatch:

This is in response to your request for an opinion concerning whether property acquired under Section 205.010, RSMo, Cum. Supp. 1957, providing for the establishment and maintenance of county health centers, is taxable by the state or county taxing authorities.

Your letter reads as follows:

"We would appreciate having the opinion of your office concerning the following:

"Is property which is acquired and maintained under the provisions of Sec. 205.-010, Missouri Revised Statutes, 1949, subject to state and county taxation?"

Section 6 of Article X of the Missouri Constitution of 1945 provides, in part:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; * * *"

Both this provision and Section 137.100 of the Revised Statutes of Missouri, 1949, which reads in part:

"The following subjects shall be exempt from taxation for state, county or local purposes:

* * * * *

Honorable Earl L. Veatch

" (2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; * * * "

clearly indicate that county property receives a protected taxation status either from state or county taxation.

Section 205.010 itself provides that the county is to establish, maintain, manage and operate these public health centers. This section does not include the words "own" or "purchase." However, the wording clearly contemplates that the levy established by this section could be used to purchase property to effectuate the purposes enumerated by the statute. Further, Section 205.070 clearly provides for acquisition by the county, through gift, of real property or other property in connection with health centers. Likewise, Section 205.080 provides that bids for the construction of county health centers are to be made in the same manner as all other county property.

We are enclosing for your further reference copies of three previous opinions of this office; one dated November 13, 1933, addressed to Honorable Elliott M. Dampf, Prosecuting Attorney of Cole County, one dated May 11, 1936, addressed to Honorable Forrest Smith, State Auditor, and one dated October 13, 1938, addressed to Honorable Roy Coyne, Prosecuting Attorney of Jasper County, which are related to the subject-matter of your request.

CONCLUSION

Property acquired for the purposes of a county health center, as provided in Section 205.010, RSMo, Cum. Supp. 1957, is county property and, consequently, exempt from

Honorable Earl L. Veatch

taxation both by the state and county, within the meaning of Section 6 Article X of the Missouri Constitution of 1945, and Section 137.100 of the Missouri Revised Statutes of 1949 exempting county property from taxation by state, county or local governments.

Yours very truly,

John M. Dalton
Attorney General

JBB:lc

3 enclosures

FIRST CLASS CITIES: State property is not subject to special assessment
SPECIAL ASSESSMENTS: taxation by the terms of Section 88.333, RSMo 1949,
TAXATION: subjecting other normally tax exempt entities to
STATE IMMUNITY FROM special assessment taxation in first class cities.
SPECIAL ASSESSMENT To subject the state to special assessment taxation
TAXATION: the Legislature, by statute, must name the state or
there must be clear implication by the statutory word-
ing that the state, as a body, is subject to special
assessment taxation.

September 10, 1959



Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This is in reply to your letter of August 3, 1959, requesting information as to whether the State Highway Patrol station in St. Joseph could legally pay its proportionate part of a special assessment for curbs, gutters and pavements. Your inquiry reads as follows:

"A question has recently been raised reference paving of a city street along the north-east side of our property at St. Joseph. After conferring with Mr. John W. Schwada, Director of Budget and Comptroller, it was his opinion that your office should rule on this matter before committing our department for payment.

"The information is as follows: Our station at St. Joseph is within the city limits. Our property adjoins the city street for some one hundred-fifty or more feet along the north-easterly side. There is a new area that has recently been developed east of our station and to which this street connects. There is approximately fifty property owners on this street and they have through voluntary petition asked the City of St. Joseph to install curbs, gutters and pavement. As soon as fifty-one percent of the property owners sign they will then present the petition to the City Council for an ordinance to be passed to do this work. We have been asked to pay \$560 for the improvement on our frontage. The improvement will probably not benefit our property greatly, however to avoid ill feeling with the

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people in this area, we are willing to pay our proportionate share if it can legally be done.

"We see this question arising again from time to time on our other properties as the various cities expand their boundaries to include our property.

"Our question is: Can we legally pay the City of St. Joseph \$560 from state funds for this improvement?"

The question of a state agency being obliged to pay for local special assessments for street paving has been presented to this office on a prior occasion, and answered by our opinion of August 24, 1950, to Mr. R. L. Groves of the Adjutant General's Office. We are enclosing a copy of that opinion for your information.

In view of the fact that the enclosed opinion points to a recognized distinction in governmental tax immunity between local assessments and general public purposes, coupled with the fact that a different section of the same chapter of our statutes, i. e., immunity or the lack thereof in connection with tax bills for public improvements in first class cities, as found in Section 88.333, RSMo 1949, an extensive analysis was made to determine whether the state had subjected itself to special assessment taxation in this instance. After careful study, we have determined that the same rule expressed in the enclosed opinion is applicable in this instance, and the state is not liable for special assessments on this property. In so holding, we understand and sympathize with your view that the state agencies should endeavor to keep their public relations as good as possible in local areas, however, we feel that if the state is to make payment of its share in such instances the Legislature must take affirmative action to subject the state to special assessment taxation.

Section 88.333, RSMo, in part, reads as follows:

"In all cities of the first class in this state wherein any public improvement is made for which special tax bills are issued against private property for the payment thereof, such tax bills shall also be issued against all

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county or other public property, church property and all cemeteries, railroad rights of way and property under the control of or owned by public school districts, in the same manner and to the same effect as such tax bills are issued against other private property chargeable for such public improvements; * * * "
(Emphasis ours.)

The phrase "other public property", underscored by the writer in the above quoted statute, would seem on first blush to include state property, however, it is our view that where the state itself is concerned the Legislature must make its intent to subject state agencies to taxation implicit on its face, i. e., by affirmatively stating that the state or its agencies are subject to their proportionate share of special assessments.

+ In construing statutes of this nature, the rule of *inclusio unius est exclusio alterius* is applicable. The rule is defined in *State ex rel. Whall v. Saenger Theatres Corporation et al.*, 190 Miss. 391, 200 So. 442, 1.c. 446, as follows:

"[6] In construing this clause we are confronted with the fundamental rule of construction that where a statute enumerates and specifies the subjects or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, or under a general clause, those not of like kind or classification as those enumerated. *Inclusio unius est exclusio alterius*. * * * "

Our court has applied this rule in case of statutory powers in *Brown v. Morris*, 365 Mo. 946, 290 S. W. (2d) 160, as follows [290 S.W.(2d) 1.c. 166]:

" * * * The rule that the express mention of one thing implies the exclusion of another would also weigh against the inclusion of the additional restriction since, where special powers are expressly conferred or special methods are expressly prescribed for the exercise of power, other powers and procedures are excluded. *Kroger Grocery & Baking Co. v. City*

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of St. Louis, 341 Mo. 62, 73, 106 S.W. 2d 435,
439 [7], 111 A.L.R. 589."

Another rule of statutory construction applicable in this instance is the rule of ejusdem generis, or the limitation of the general to the specific when both general and specific words are used in a statute, i. e., the general class is limited to the same types or classes set forth in the specifically enumerated categories.

In *Hammett v. Kansas City*, 351 Mo. 192, 173 S.W.(2d) 70, our court expressed the rule as follows [173 S.W.(2d) 1.c. 75]:

" * * * 'The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified.'"

X

Applying these rules to Section 88.333, RSMo, we note that the state is not specifically listed, while other governmental bodies normally thought of as tax exempt entities are listed, i. e., counties, school districts. Likewise, the term "public property," the general category listed, would seem to include normally tax exempt entities of the type specifically listed as subject to special assessment by applying the ejusdem generis rule.

Realizing that these are rules of construction and not rules of law, nevertheless, where the state is to be subjected to taxation the presumption is that it is not subject to taxation.

X See *State ex rel. Cairo Bridge Commission v. Mitchell et al.*, 352 Mo. 1136, 181 S.W.(2d) 496, certiorari denied 322 U.S. 772, 65 S. Ct. 131, 89 L. Ed. 617. Again, we quote, 181 S.W.(2d) 1.c. 499:

" * * * The general doctrine is that tax exemption statutes should be strictly construed because taxes are imposed on the whole citizenry for the support of the government, and exemptions are discriminatory. 61 C.J. § 396, p. 392. 'Taxation is

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the rule, exemption is the exception.' Young Women's Christian Ass'n v. Baumann, 344 Mo. 898, 902(1), 130 S.W. 2d 499, 501(1). But as to property owned by the State or any of its political subdivisions, the doctrine is reversed. There taxation is the exception and not the rule. This State in its Constitution expressly exempts its own property as well as that of counties and 'other municipal corporations'; and also certain land or property used for other specified public purposes, Sec. 6, Art. X, Mo. R.S.A. There is no presumption that the State intends to tax itself. * * *

Clear pronouncement by the Legislature would be necessary in this field to subject the state or even enable the state to pay special assessments. This is the view expressed by our courts in City of Clinton v. Henry County, 115 Mo. 557, 22 S.W. 494, 1.c. 496, 497:

" * * * The statute giving to cities power to levy local assessments for street improvements uses the most general language. Such language is not sufficient to embrace the property of the state or property of the county which has been devoted to strictly public uses, - which in fact constitutes one of the instrumentalities provided for carrying on the state government.

* * * * *

"It is true the cases last cited were all suits against private property owners; and as it is within the power of the legislature to make property devoted to public uses liable for local assessments, and as it is contrary to public policy to permit public property to be sold, we may and do concede that the legislature can provide for the payment of local assessments against public property out of the general treasury. Such a provision would doubtless be sufficient to show an intent to make such property liable for these assessments. But the legislature has made no such provision. The argument, therefore,

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that the courts can devise a remedy where there is a right does not meet the issue in this case; for the real question is whether the city had the power or right to levy the assessments upon public property, and we are unable to find any evidence of such a legislative intent.

* * * * *

"The property here in question is strictly public property, and, on well-settled principles of law, cannot be held liable for these local improvement assessments until the legislature so says, in clear terms, or by necessary implication, and that it has not done by the statute relating to cities of the third class. There is much merit in the argument that the public - the beneficial owner of the courthouse property - ought, as a matter of fairness, to bear a part of the cost of improving the streets, but the argument addresses itself to the legislature. Courts must declare the law as they find it."

-x

CONCLUSION

It is the opinion of this office that the state has not subjected itself to special assessment taxation in first class cities by the terms of Section 68.333, RSMo 1949, which has subjected the normally tax exempt entities to special assessment taxation. To subject the state to special assessment taxation, the Legislature must, by statute, affirmatively say the state is subject to special assessment taxation, or the implication, by statutory wording, must be clear and unmistakable that the state has subjected itself to special assessment taxation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. B. Buxton.

Very truly yours,

John M. Dalton
Attorney General

Enclosure
JEB:lc/cm

LEGISLATURE:
GENERAL ASSEMBLY:
MILEAGE:
LEGISLATIVE COMMITTEES:
EXPENSE ACCOUNTS:

Members of Interim Committee on Labor created by House Concurrent Resolution No. 13, 70th General Assembly, are entitled to mileage at 7 cents per mile.

November 6, 1959



Honorable Thomas A. Walsh, Member
Missouri House of Representatives
70th General Assembly
2735A North Spring Avenue
St. Louis 13, Missouri

Dear Mr. Walsh:

We have received your request of October 5, 1959 for an opinion of this office, which request reads as follows:

"Will you please furnish me with a memo with regard to the amount of mileage a legislator is allowed for trips to and from Jefferson City for work on interim committees.

"The Missouri Constitution allows ten cents per mile once a session; and Section 33.090 states that the State Comptroller is empowered to set rules and regulations governing the incurring of travel expenses on behalf of the state, which amount has been set at seven cents per mile."

The request is so phrased as to include all interim committees of the General Assembly, however, as you are Chairman of the Interim Committee on Labor, we have assumed that you are interested in the mileage allowance so far as it affects that committee, and this opinion has been prepared accordingly.

Section 16, Article III, Constitution of Missouri, 1945, provides for the compensation and mileage allowance for members of the General Assembly and reads as follows:

"Senators and representatives shall receive from the state treasury as salary the sum of one hundred and twenty-five dollars per month, and upon certification by the president and secretary of the senate and by the speaker and chief clerk of the house of representatives as

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to the respective members thereof, the state auditor shall audit and the state treasurer shall pay such compensation without legislative enactment. Senators and representatives shall receive one dollar for every ten miles traveled in going to and returning from their place of meeting, once in each session, on the most usual route."

The portion of Section 16, Article III, Constitution of Missouri, 1945, relating to mileage allowance is implemented by Section 21.140, RSMo 1949, which reads as follows:

"Senators and representatives shall receive one dollar for every ten miles traveled, and an amount for travel for any fractional part of ten miles at the same rate, in going to their place of meeting in Jefferson City from their place of residence, and returning from their place of meeting in Jefferson City to their place of residence, once in each regular session and once in each special session, on the most usual route."

It is to be noted that Section 16, Article III, Constitution of Missouri, 1945, and Section 21.140, supra, both of which are set out hereinabove, authorize members of the General Assembly to be paid mileage at the rate of ten cents per mile from their place of residence to Jefferson City and returning from Jefferson City to their place of residence once during each regular session and once during each special session of the General Assembly.

In view of the fact that Section 16, Article III, Constitution of Missouri, 1945, and Section 21.140, supra, limit the ten cents' mileage allowance to one round trip for each session, it is necessary to look elsewhere for authorization to pay travel expenses of members of the interim committees of the General Assembly.

In reviewing the statutes we are unable to find any statute which allows members of interim committees any specific amount per mile for attending meetings of the committee. House Concurrent Resolution No. 13 which created the Interim Labor Committee provides that members of the committee are to be reimbursed for their actual and necessary expenses but it does not specify the amount per mile they are to be allowed. The pertinent portion of this resolution reads as follows:

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"BE IT FURTHER RESOLVED that the members of the Committee be reimbursed for their actual and necessary expenses while attending meetings of the committee or any subcommittee thereof, to be paid from the joint contingent fund."

Section 23.070, MoRS Cum. Supp. 1957, provides that members of the Legislative Research Committee are entitled to mileage (the amount allowed is not set out in the statute) and necessary expenses incurred while attending meetings of the committee within the state; however, said expenses are limited to \$250.00 for any period of two calendar years. Section 16.080, RSMo 1949, provides that the members of the Missouri Commission on Interstate Cooperation, which is composed in part of members of the House and Senate Committees on Interstate Cooperation, shall serve without compensation but shall be paid their necessary expenses in carrying out the duties of the commission. Section 21.445 provides that the Joint Committee on Correctional Institutions and Problems shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties.

None of the above-cited sections, which relate to permanent interim committees of the General Assembly, specify the amount per mile that the members are entitled to for traveling to and from hearings of the committees. Sections 16.080 and 21.445, supra, provide that the committee members are to be reimbursed for actual and necessary expenses. Section 23.070 does provide that the members shall be entitled to mileage and necessary expenses incurred while attending meetings of the committee but the amount per mile is not specified.

Section 33.090, RSMo 1949, authorizes the Comptroller to establish rules and regulations governing expenses incurred on behalf of the State of Missouri and reads as follows:

"The comptroller shall be empowered to promulgate rules and regulations governing the incurring and payment of reasonable and necessary travel and subsistence expenses actually incurred on behalf of the state, which rules and regulations shall take effect not less than ten days after the filing thereof in the office of the secretary of state."

Under the authority conferred by Section 33.090, supra, the Comptroller has promulgated rules and regulations governing

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travel and subsistence expenses incurred on behalf of the State of Missouri. These rules and regulations are entitled, "Regulations for the Guidance of Officials and Employees of the State of Missouri while Traveling on Official Business." Rule 9 of the regulations, as amended, reads as follows:

"Allowance for travel by privately owned automobiles will be at a rate not to exceed seven cents per mile, unless State laws make other provisions. Only the owner of the automobile receives mileage. (That is, if two or more people travel in the same automobile only 7¢ per mile is paid to one employee.) Mileage allowance outside the State of Missouri is not reimbursable unless travel by such means is advantageous to the State. Parking and toll charges will be allowed when the official or employee is engaged in compensable travel."

It would appear that the travel of members of the Interim Labor Committee in connection with their committee assignment is expense incurred on behalf of the State of Missouri, and in absence of statutory authority to the contrary, which we have been unable to find, the members of the committee would be governed by the rules and regulations promulgated by the Comptroller under the provisions of Section 33.090.

CONCLUSION

Therefore, it is the opinion of this department that members of the Interim Committee on Labor are entitled to receive an allowance of seven cents per mile for travel in connection with their committee assignment.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Calvin K. Hamilton.

Yours very truly,

JOHN M. DALTON
Attorney General

CKH:mlw:ac

ABTRACTOR'S BOOKS
SUBJECT TO ASSESSMENT
AND TAXATION:

An abstractor's books and/or
records are tangible personal
property and are subject to assess-
ment and taxation.

July 15, 1959



Honorable Jay White
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"The County Court and Assessor has requested
for a written opinion as follows.

"Is an abstractor's records, under the law,
considered tangible personal property, and
thus subject to assessment and taxation as
other tangible personal property? These
records are insurable and have some consider-
able market value. I would appreciate your
written opinion on this question."

By the term "abstractor's records" you no doubt mean what
is more generally called the "abstractor's books."

It is the opinion of this department that such books are
tangible personal property and so are subject to assessment and
taxation as is other tangible personal property. What is called
the "abstract business" is a recognized, highly necessary, and
lucrative business operation. And without the "records" or
"books" to which you refer, it would be virtually impossible for
an abstractor to conduct his business. Furthermore, as you state,
an abstractor's books have a very considerable monetary value for
which there is usually a ready market.

Section 137.120, RSMo 1949, sets forth what an assessor's
property list shall contain. There is no mention therein of
books of any kind. However, we note numbered paragraph six of
said section which, after enumerating a number of items which
should be on the assessor's list, concludes by stating "and
every other species of tangible personal property not exempt
by law from taxation."

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We also direct attention to numbered paragraph three of Section 137.010, RSMo 1949, which defines tangible personal property. This paragraph reads:

"'Tangible personal property' includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined."

We may state that nowhere in the law do we find books of any kind nor abstractor's books specifically exempted. And in this regard we note the case of State vs. Gehner, 294 SW 1017, which at 1.c. 1018 (1) states: "The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation."

We also note the recent case of Zeiting vs. Mitchell, 244 SW 2d 91. This case was one concerning the discovery and recovery of assets of a decedent's estate, but it is pertinent to the issue here, in that it gives us a definition of "property" which includes books. At 1.c. 95 (1) the court states in part:

"It is to be noted that Section 462.400 in terms provides that if any person conceals, embezzles or wrongfully withholds, 'goods, chattels, money, books, papers or evidences of debt' of the deceased, the affidavit therein provided for may be filed. The fourth of these sections, 462.430, collects the 'goods, chattels, money, books, papers, or evidences of debt', separately named in Section 462.400, into the word 'property', and provides that after judgment, 'the court shall compel the delivery of the property detained' (if the court needs to do so) by attachment for contempt and commitment to jail until the order of the court is complied with."

It would seem to be clear that the books of an abstractor are tangible personal property of very definite value; that they are not exempted by law from assessment and taxation, and are therefore subject to such assessment and taxation.

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CONCLUSION

It is the opinion of this department that an abstractor's books and/or records are tangible personal property and are subject to assessment and taxation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:bw:mjb

SCHOOLS: State Board of Education may retain
SCHOOL FOR THE BLIND: investments coming to it for the use
SCHOOL FOR THE DEAF: of Missouri School for the Blind and
STATE BOARD OF EDUCATION: Missouri School for the Deaf if prudent
TRUSTS: man under all circumstances prevailing
would do so.



October 1, 1959

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated September 21, 1959, which request reads as follows:

"The State Board of Education is authorized by law, Section 177.025, Laws of 1959, to receive and administer any grants, gifts, devises, or donations by individuals or corporations to the Missouri School for the Blind and the Missouri School for the Deaf. Any grants, gifts, devises, bequests or donations made for a specified use shall not be applied to any other uses.

"Section 177.030 provides that the State Board of Education shall have the care and control of all property, real and personal, owned by the schools. This law further provides that the State Board of Education may sell, convey, exchange or convert into money, property of any nature, real, personal or mixed, acquired through any grant, gift, bequest, devise or donation to the School for the Blind and the School for the Deaf, for their use when deemed necessary by the State Board of Education.

"Section 177.035 directs that all funds derived from grants, gifts, donations or bequest or from the sale or conveyance of any such property shall be deposited in

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the State Treasury and credited to special trust funds and shall be appropriated only for the purpose of carrying out the objects for which the funds were given as recommended by the State Board of Education.

"Since the effective date of these laws the State Board of Education has received and accepted considerable personal property. Any money received by the State Board of Education has been deposited to the credit of the proper fund in the State Treasury as provided by law. Some personal property, such as securities in the form of certificates of stock, or shares, have been received by the State Board of Education. Full title of ownership has been established in the transfer of such stock. Some of the securities received by the State Board could well be sold and turned into cash immediately while for others it seems to be more advantageous to hold until such time as may be determined by the State Board of Education.

"The question at issue is whether the State Board of Education, under the laws providing for the acceptance of property and the converting of such property into money, has discretionary power for determining when property, real or personal, shall be sold or converted into money so that it may be deposited in the State Treasury.

"I shall appreciate your advice and official opinion in answer to the following question:

Does the State Board of Education have discretionary power in determining when property received through grants, gifts, devises, or donations, shall be sold and turned into money? If it is found advantageous to hold some securities for some period of time and that it would not prevent carrying out the purpose for which the funds were given, could such securities be retained until such time as the State Board of Education may desire to authorize the sale of them?"

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Senate Bill No. 8 of the 70th General Assembly added Sections 177.025 and 177.035 and amended Section 177.030, RSMo. Those sections read as follows:

§177.025.

"The state board of education may receive and administer any grants, gifts, devises, bequests or donations by any individual or corporation to the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton. Any grants, gifts, devises, bequests or donations made for a specified use shall not be applied either wholly or in part to any other use or uses."

§177.035.

"1. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Blind shall be deposited in the state treasury and credited to a special fund known as the 'School for the Blind Trust Fund', which is hereby created.

"2. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Deaf shall be deposited in the state treasury and credited to a special fund known as the 'School for the Deaf Trust Fund', which is hereby created.

"3. The moneys in the school for the blind trust fund or in the school for the deaf trust fund shall not be appropriated for the support of such schools in lieu of general state revenues but shall be appropriated only for the purpose of carrying out the objects for which the grant, gift, donation, devise or bequest was made as recommended by the state board of education."

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\$177.030.

"The state board of education shall have the care and control of all property, real and personal, owned by the schools. The state board of education shall not sell or in any manner dispose of any real estate belonging to the schools without an act of the general assembly authorizing the sale or disposal of such real estate, except that the state board of education may sell, convey, exchange or convert into money property of any nature, real, personal or mixed, acquired through any grant, gift, bequest, devise or donation by individuals or corporations to the Missouri School for the Blind at St. Louis or to the Missouri School for the Deaf at Fulton, for their use when deemed necessary by the state board of education."

Since these sections are new, the courts of this state have not construed them as yet; consequently, it is necessary to look to analogous situations in order to ascertain the answer to your question.

The most nearly analogous case we have been able to find is that of *Burrier v. Jones*, 338 Mo. 679, 92 SW2d 885. There, a testator left the residue of his estate "to the Macon County, Mo., school funds." A statute, now Section 456.090, RSMo 1949, provided then, as now, that each county in this state should have power to act as trustee for charitable uses. Among other things, the court found that a gift for the advancement of education was a charitable use and that the lower court was correct in ruling that this clause of the will should be construed to mean "that Macon County, Missouri, has been designated as trustee, and that the trust can be made operative under the direction and control of the judges of the county court of said county, for the use and benefit of the school funds of the county."

Even though on its face this was an absolute gift to the county school fund, the court found that by operation of law it was actually a charitable trust with the county to act as trustee.

Similarly, many of the gifts to the Missouri School for the Blind and the Missouri School for the Deaf may be phrased

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as absolute gifts. Nevertheless, by applying the reasoning of the Burrier case we believe that they would be held to constitute charitable trusts with the State Board of Education acting as trustee.

In *Murphey v. Dalton*, Mo., 314 SW2d 726, 730, the Supreme Court said:

" * * * it is well established that the duties and liabilities of the trustees of public charitable trusts are like the duties and liabilities of the trustees of private trusts, and that the same principles applicable to private trusts govern in public charitable trusts. * * *"

As a trustee, the State Board of Education is in a different position than other trustees because it has no authority to invest or reinvest the trust funds. This is so because of Section 177.035, supra, which requires that funds derived from grants, gifts, donations or bequests, or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Blind or Missouri School for the Deaf, shall be deposited in the state treasury to the credit of the appropriate trust fund. Even though the State Board of Education as trustee does not have the problem of determining what would be a proper investment for funds in its hands as trustee, it is subject to the same rules and restrictions as any other trustee in determining what investments coming to it by way of gift, grant, bequest or devise should be retained or converted to cash.

In some states, trustees are limited by statute as to the securities in which they may invest. The same rule generally is made applicable to retention of investments received from the settlor. In Missouri, however, there is no statutory regulation of investments. Rather, by court decision, trustees are held to the standard of a prudent man both in investments and retention of investments. For example, in *Warmack v. Crawford*, 239 Mo. App. 709, 195 SW2d 919, 925, the testator had established a trust estate which consisted mostly of stock of the International Shoe Company. The trust instrument provided that the "trustees, without accountability for loss, may retain as investments of the trust estate, any and all real estate, or bonds, stocks, loans, and other securities received in trust hereunder." The question was whether, under the

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provisions of the will, and under all the circumstances, the trustees were required to sell and dispose of any portion of the International Shoe Company stock held by them as a part of the trust estate, and whether they would be guilty of any breach of legal duty or abuse of discretion in continuing to hold all of said stock. The court said at 8W2d 1.c. 925:

" * * * The court should have advised the trustees that under the terms of the will they were not required to sell and dispose of any portion of the stock of the International Shoe Company unless it appeared to them that said stock was not such an investment as a prudent man would make, having primarily in view the preservation of the estate, and the amount and regularity of the income to be derived. Rand v. McKittrick, 346 Mo. 466, 142 S.W.2d 29; St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W.2d 68; Fairleigh v. Fidelity Nat. Bank & Trust Co. of Kansas City, 335 Mo. 360, 73 S.W.2d 248. In determining this matter, the question of diversification need not be ignored, but it is not a controlling factor. The whole thing rests within the sound discretion of the trustees. They alone can exercise it. They cannot shift the duty to the Court. The Court can interfere only where there is an abuse of that discretion."

In other words, the court seems to have said that, even though the trust instrument authorized the retention of investments received from the testator, the trustees would still be held to the prudent man standard.

In the usual trust situation, the matter of retention of investments is covered by the trust instrument. In the case of securities coming to the Missouri School for the Blind and the Missouri School for the Deaf, however, it is regulated by statute. Specifically, Section 177.030, supra, provides that the State Board of Education may sell, convey, exchange or convert into money such investments "when deemed necessary by the state board of education." This language obviously was inserted as an exception to the preceding clause prohibiting the sale of any real estate belonging to the schools so as to authorize the conversion of such gifts to cash without a special

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act of the General Assembly. However, the last-quoted clause, "when deemed necessary by the state board of education," goes farther and vests discretion in the State Board as to whether such investments shall be retained. In other words, on its face this section authorizes retention of investments until and unless the State Board of Education deems it necessary to convert them to cash, etc.

In spite of this seemingly broad grant of discretionary power, in our opinion the State Board of Education would be held to the prudent man standard the same as the trustees were in the Warmack case, *supra*. The only major difference between the two cases is that in the Warmack case the authorization to retain investments was granted by the will, whereas here it is by statute. This should make no difference in the applicable law.

In Scott on Trusts, Second Edition, Volume III, Section 230, pp. 1715, 1718, the following is found:

(P. 1715)

"Where a trustee on the creation of the trust receives securities which are not proper trust investments, it is his duty to dispose of them within a reasonable time and to invest the proceeds in securities which are proper trust investments, unless it is otherwise provided by the terms of the trust or by statute. This is true not only where the securities which he receives are not of the limited type of investments permitted in some states by statute or decision, as for example where they consist of shares of stock in jurisdictions in which a trustee is not permitted to invest in shares of stock, but also where the particular securities have become of such a speculative character that a prudent man would not invest in them. There are numerous cases in which a trustee has been surcharged for failing to sell such securities within a reasonable time after the creation of the trust. On the other hand, a trustee is not liable merely because he fails to sell the securities immediately or even after a considerable interval, if under the circumstances he acted prudently in postponing the sale."

Mr. Hubert Wheeler

(p. 1718)

"In several states it is provided by statute that trustees may retain investments received from the testator even though they are not proper investments for a trustee to make. The effect of these statutes is to establish a different rule with respect to the making and the retention of investments by trustees. Even under these statutes, however, it is the duty of the trustee to exercise prudence in determining whether to retain investments made by the settlor. As we shall see, an authorization or even a direction to retain securities does not justify the trustee in retaining them if there is subsequently such a change of circumstances that it becomes imprudent to retain them."

CONCLUSION

It is, therefore, the opinion of this office that Senate Bill No. 8 of the 70th General Assembly (\$177.025 - 177.035, RSMo) does vest the State Board of Education with discretion in determining when it is necessary to sell securities and other investments coming to it for the use and benefit of the Missouri School for the Blind and the Missouri School for the Deaf. It is our further opinion that the State Board of Education, in the retention of such investments, is subject to the prudent man standard. In other words, it may, in the exercise of its discretion, retain such investments if a prudent man under all the circumstances prevailing would do so.

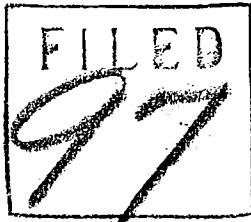
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

JOHNSON GRASS CONTROL:
COUNTY WEED BOARD
AGRICULTURE DEPARTMENT:



Section 263.265, RSMo Cum. Supp. 1957, authorizes the county court, township board and special road district of any county declared a Johnson grass extermination area to expend the tax which this section authorizes for the purpose of controlling and eradicating Johnson grass only on county roads and right of ways.

February 12, 1959

Honorable John S. Williamson
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Mr. Williamson:

This is in response to your request for an opinion, January 22, 1959, which we quote:

"A question has come up concerning the fiscal responsibilities of the Department of Agriculture under the 'Johnson Grass Law' (HB. 23, 1957), and we need an opinion as to this responsibility.

"Sub-section 2 of Section 263.259 says in part, 'The state commissioner of agriculture shall inspect or cause to be inspected all lands of the county between the dates of August fifteenth and October thirty-first of each year during which time the county is classed as a Johnson grass extermination area. The county weed control board shall assist in the inspection upon the request of the commissioner of agriculture. The commissioner and his designated representatives as well as the county weed control board shall have the right of ingress and egress upon all lands in the county in making an inspection or performing any other duties imposed by Sections 263.255 to 263.267.'

"The act also provides in Section 263.257, sub-section 2 in part 'Members of the board shall receive no salary but shall be fairly reimbursed by the county court for necessary expenses incurred in performance of their duties.'

"In none of the above sections do we find provision for compensating personnel that will be needed to make the field inspections, except such inspections

Honorable John S. Williamson

as would be made by members of the weed control board.

"May we add here, that in our opinion, the field inspections required by the act could not be done by the three members of the weed control board even though they were willing to do the inspection. The time allowed for the act would not permit it.

"Section 263.265 provides that the county courts. . . . shall be authorized to levy upon all property subject to its authority a tax in an amount not to exceed five cents on each one hundred dollars' valuation, for the purpose of controlling and eradicating Johnson grass on county roads and right of ways.

"In your opinion does this section imply the use of tax funds, for costs in administering the law within a county?"

It is the opinion of this office that the tax authorized by Section 263.265, RSMo Cum Supp. 1957, may be used only for the purpose of controlling and eradicating Johnson grass on county roads and right of ways.

Section 263.257(2):

"The state commissioner of agriculture shall within ten days after receipt of the notice provided in subsection 1 appoint a three-man county weed control board, composed of citizens of the county, to serve as advisers and to assist in the administration of Sections 263.255 to 263.267, and to perform such other duties as prescribed by the commissioner of agriculture. Members of the board shall receive no salary but shall be fairly reimbursed by the county court for necessary expenses incurred in performance of their duties."

Section 263.259(2):

"The state commissioner of agriculture shall inspect or cause to be inspected all lands of the county between the dates of August fifteenth and October thirty-first of each

Honorable John S. Williamson

year during which the county is classed as a Johnson Grass Extermination Area. The county weed control board shall assist in the inspection upon request of the commissioner of agriculture. The commissioner and his designated representatives as well as the county weed control board shall have the right of ingress and egress upon all lands in the county in making an inspection or performing any other duties imposed by sections 263.255 to 263.267. All failures to comply with the provisions of sections 263.255 to 263.267 shall be reported to the prosecuting attorney of the county and it shall be his duty to prosecute all violations of sections 263.255 to 263.267 in the manner provided in section 263.262."

Section 263.265:

"The county court, township board and special road district of any county declared a Johnson Grass Extermination Area, in addition to any and all taxing powers which it may possess, shall be authorized to levy upon all property subject to its authority a tax in an amount not to exceed five cents on each one hundred dollars' valuation, for the purpose of controlling and eradicating Johnson grass on county roads and right of ways. The cost of control and eradication of Johnson grass on all lands and highways owned or supervised by the state highway department shall be paid by the highway department out of funds appropriated for its use."

Section 263.259(1):

"The state commissioner of agriculture shall have the following duties:

- (1) He shall supervise the control and eradication of Johnson grass;
- (2) He shall inspect land and places for compliance with the provisions of sections 263.255 to 263.267;
- (3) He shall inform himself of the origin, nature and appearance of

Honorable John S. Williamson

Johnson grass and the manner in which it is disseminated and shall follow recommendations of the Missouri College of Agriculture as to the best and approved method to control, eradicate and prevent the dissemination of Johnson grass;

(4) He shall cooperate with and have authority to enter into cooperative agreements with state and federal agencies and departments for the furtherance of the control and eradication of Johnson grass. The state commissioner shall make all rules and regulations for carrying out the provisions and requirements of sections 263.255 to 263.267."

We believe that the words "county roads and right of ways," as used in Section 263.265, are restrictive and cannot be construed to mean the lands owned or controlled by individuals or agencies other than the county. It is to be noted that Section 263.265 also states that the cost of control and eradication of Johnson grass on all lands or highways owned or supervised by the State Highway Department shall be paid by the highway department out of funds appropriated for its use. We see within this Section 263.265 the provisions for payment of cost of control in part from two different agencies. We do not believe that the five cent tax was intended to cover the entire expense of the program.

You will observe that Section 263.257(2) provides for the reimbursement by the county court for the necessary expenses of the county weed control board in performance of their duties.

We see in this act no specific provision for the payment to the Department of Agriculture for its efforts and expenses in the inspection of all the county lands. Section 263.259(2) states that the state commissioner of agriculture shall inspect or cause to be inspected all lands of the county between specified dates. You will note that it also states that the county weed control board shall assist in the inspection upon request of the commissioner. Apparently discretion is lodged with the commissioner with respect to the delegation of the duties of the inspection to the county weed board, and to that extent we would judge that the county court may reimburse the weed control board for the necessary expenses incurred in the performance of their duties of inspection. Section 263.257(2) states with respect to the weed control board that they are " * * * to perform such other duties

Hon. John S. Williamson

as prescribed by the commissioner of agriculture." Section 263.259 (2) states, "The county weed control board shall assist in the inspection upon request of the commissioner of agriculture."

CONCLUSION

Therefore, it is the opinion of this office that Section 263.265, RSMo Cum. Supp. 1957, authorizes the county court, township board and special road district of any county declared a Johnson grass extermination area to expend the tax which this section authorizes for the purpose of controlling and eradicating Johnson grass only on county roads and right of ways.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

COUNTY OFFICERS: A sheriff is not entitled to a fee for service of a writ of execution in a misdemeanor case where punishment is assessed at a fine and costs, if such fine and costs are paid before the issuance of a writ of execution or at the time of conviction. If such fine and costs are not paid before the issuance of a writ of execution, the sheriffs' fee for service of a writ of execution becomes a part of the costs to be collected by the sheriff.

September 25, 1959



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This is in reply to your request of recent date for an opinion relating to whether a sheriff could collect a one dollar fee for an execution in a criminal case where punishment is assessed at a fine and costs. Your inquiry reads as follows:

"A question has arisen in the Sheriff's office here as to whether, after a conviction in Magistrate Court, and punishment assessed at fine and costs, the Sheriff should collect, as part of the costs, \$1.00 for execution. I would appreciate your opinion on this."

Section 57.290, RSMo Cum. Supp. 1957, the statutory provision for sheriff's fees in criminal cases, reads, in part, as follows:

"1. Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

* * * * *

For serving every writ of execution. . . . \$1.00."

What constitutes an "execution" is well defined in Brown vs. U.S. 6 Ct. Cl. 171, 1.c. 178:

"* * * An execution at law is a writ issuing out of a court, directed to an officer thereof, and running against the body or goods of a party. * * * *"

Honorable Robert P. C. Wilson, III

We are enclosing for your information an opinion dated April 21, 1955, to Honorable J. W. Grossenheider, discussing what constitutes normal court costs in a magistrate court where there has been a conviction of a misdemeanor. Please note that there is a negative implication in this opinion that the one dollar fee to the sheriff for service of a writ of execution is not part of the normal court costs assessed by the magistrate. This opinion assumes that payment is received at the time of conviction for both fine and costs.

Since the sheriff receives the fee under the provisions of Section 57.290, RSMo Cum. Supp. 1957, for "serving every writ of execution," it follows logically that if a defendant pays his fine and costs at the time of his conviction, so that it is not necessary to issue and serve a writ of execution, the fee for serving a writ of execution is not properly included in the costs. On the other hand, if the defendant does not pay the fine and costs and it becomes necessary to issue and serve a writ of execution, the \$1.00 fee for serving a writ of execution becomes a part of the costs to be collected by the sheriff.

CONCLUSION

Therefore, it is the opinion of this office that the \$1.00 fee granted to a sheriff under the provisions of Section 57.290, RSMo Cum. Supp. 1957, for service of a writ of execution is not a part of the costs in the case of a misdemeanor conviction in magistrate court if the defendant pays his fine and the costs at the time of conviction. If the defendant does not pay the fine and costs and it becomes necessary to issue and serve a writ of execution, the \$1.00 fee provided for the service of a writ of execution becomes a part of the costs to be collected by the sheriff.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Jerry B. Buxton.

Yours very truly,

John M. Dalton
Attorney General

Enc. (1)
JBB:mw

COLLECTION:

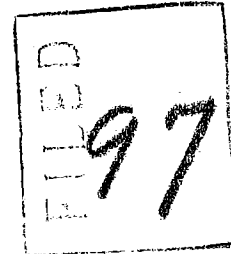
DELINQUENT

PERSONAL TAXES:

A County court in a county of the third class is not authorized to compromise a judgment obtained for the collection of delinquent, tangible, personal property taxes. It is the further opinion of this department that it is the duty of the prosecuting attorney of a county of the third class to file suits for the collection of such taxes and to charge the fees authorized by Section 140.740, RSMo Cum. Sup. 1957, and upon collection of same to pay such fees into the county treasury.

December 2, 1959

Honorable Paul E. Williams
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Williams:

Your recent request for an official opinion reads:

"Several questions have come up in this county relative to the collection of delinquent taxes which I cannot answer by reading material available to me. They are:

1. Is the County Court authorized to compromise a judgment authorized under 140.740 (2) RSMo. 57 supplement?
2. May the collector, with the advice and consent of the County Court, hire the attorney as provided in the above section and pay to him the fee provided even though such attorney is also Prosecuting Attorney of the county in question?
3. If the County Court does in fact compromise such a judgment already rendered with the time for appeal having passed, and remove the provision for attorney fee from said judgment, is the County Court then authorized to pay an attorney's fee to the Prosecuting Attorney, or to any other lawyer hired for that purpose?
4. If such attorney fees are in fact payable, from what fund would they come?"

Honorable Paul E. Williams

In regard to your first question, it is the opinion of this department that a county court is not authorized to compromise a judgment obtained under Section 140.740, RSMo Cum. Supp. 1957. We find no statutory or case authority for any such action, and do not believe that such authority exists.

On December 11, 1942, this department rendered an opinion, a copy of which is enclosed, to Honorable George S. Montgomery, Presiding Judge, County Court of Jackson County. That opinion held, as you will note, that a county court was not authorized to charge or abate a personal tax which had been erroneously assessed in the wrong tax district.

Our answer, then, to your first question is in the negative.

Your second question is whether the collector, with the consent of the county court, may obtain the services of the prosecuting attorney for the collection of delinquent personal property taxes and pay to him the fee provided by Section 140.740, RSMo Cum. Supp. 1957, which section reads:

"1. Before any suit shall be brought to recover delinquent tangible personal property taxes, the collector shall notify the delinquent taxpayer by regular mail, addressed to the last known address of such taxpayer, that there are taxes assessed against him, stating the amount due and the years for which they are due, and that if the same are not paid within thirty days an action will be brought to recover such taxes; for which notice a fee of twenty-five cents may be charged and collected by the collector. In any action to recover said personal property taxes a certificate of the collector that he has mailed said notice as herein required and giving the date of such mailing shall be attached to the petition and shall constitute prima facie evidence that such notice has been duly given.

"2. In each such action a fee in the amount of ten per cent of the taxes due, but in no event less than five dollars, shall be allowed the attorney for the collector. Such attorney fee

Honorable Paul E. Williams

and all collector's fees shall be included in the judgment for taxes in such action."

It is our opinion that it is the duty of the prosecuting attorney to handle such suits; and that the fee provided by Section 140-740, supra, should be assessed as costs as provided in above section, but that the prosecuting attorney may not retain such fees but that they should be turned over by him to your county treasury.

On April 28, 1953, this department rendered an opinion, a copy of which is enclosed, to Honorable J. T. Campbell, Representative of Buchanan County, Third District. On November 22, 1955, this department rendered an opinion, a copy of which is enclosed, to Honorable Lyndon Sturgis, Prosecuting Attorney of Greene County. These two opinions hold as we have indicated above. It is true that both of these opinions were written with regard to second class counties, whereas we take note of the fact that Pike County is a county of the third class. However, we believe these opinions are equally applicable to counties of the third class. It will be noted that the Campbell opinion is predicated upon the fact that it is the duty of a prosecuting attorney in any county of any classification to represent the county in all civil suits in which the county is interested as set forth in Section 56.070, RSMo 1949; and the further fact that a suit for the collection of delinquent taxes is a suit in which the county is interested irrespective of class, and also upon Section 56.340, which makes it the duty of a prosecuting attorney in counties of the second, third and fourth classes to turn over to the county treasurer at the end of each month all money collected by him as fees. The same general line of reasoning is followed in the Sturgis opinion.

Your third and fourth questions are predicated upon an affirmative answer to your first question, and since our answer to that question was in the negative your third and fourth questions become moot.

CONCLUSION

It is the opinion of this department that a county court in a county of the third class is not authorized to compromise a judgment obtained for the collection of delinquent, tangible, personal property taxes.

Honorable Paul E. Williams

It is the further opinion of this department that it is the duty of the prosecuting attorney of a county of the third class to file suits for the collection of such taxes and to charge the fees authorized by Section 140.740, RSMo Cum. Supp. 1957, and upon collection of same to pay such fees into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

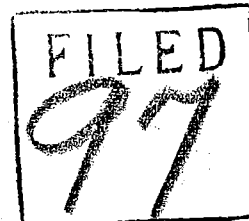
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Enclosures

COMMERCIAL MOTOR VEHICLE: A one-half ton pickup truck, although used primarily for the transportation of persons and not regularly used for the transportation of freight and merchandise, is a commercial motor vehicle within the meaning of numbered paragraph one of Section 301.010, RSMo, C.S. 1957, and being so its owner must comply with Section 301.330, RSMo, C.S. 1957.

December 24, 1959

Honorable Paul E. Williams
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Mr. Williams:

Your recent request for an official opinion reads:

"Your opinion furnished to me relative to my last inquiry did not answer the precise point in question which is simply this: Is a one-half ton pick-up truck used principally for a passenger conveyance in the style of most farmers who own such a truck a commercial vehicle within the meaning of the law which requires lettering of the name, gross weight, and scope of operation on the side of said pick-up?"

In numbered paragraph one of Section 301.010, RSMo, C.S. 1957, we note a definition of commercial motor vehicles which reads:

"'Commercial motor vehicle,' a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers."

We also note Section 301.330, RSMo, C.S. 1957, which reads:

"All commercial motor vehicles shall display in a conspicuous place on both sides thereof:

- (1) The name of the owner;
- (2) The address from which such motor vehicle is operated;
- (3) The gross weight for which said vehicle is licensed;
- (4) Local commercial vehicles in addition shall display in a conspicuous place the word 'local'."

It would appear that the case of State v. Lasswell, Mo.App., 311 SW2d 356, a 1958 opinion of the Springfield Court of Appeals, is directly in point. In that case the defendant was driving a

Honorable Paul E. Williams

half-ton pickup truck. The bed was empty. The vehicle had on it a truck license plate, but none of the information required by Section 301.330, supra. At the trial the defendant testified that he carried simply incidental property of his own in this truck, such as spare tires, tools, et cetera. His contention was that this truck was not "a commercial motor vehicle", and such being the case he did not need to comply with Section 301.330, supra. We may note here that none of the information required by that section was displayed on the truck, which, of course, was the reason that the arrest was made.

In finding that the defendant was operating a commercial motor vehicle and should have complied with Section 301.330, the court stated (l.e. 358 [5], [6]):

"[5] * * * In consideration of this question, we must be controlled by the statutory definition of 'commercial motor vehicle' in Section 301.010(1), to-wit, 'a motor vehicle designed or regularly used for carrying freight and merchandise'; and, since the state frankly concedes that there was no evidence that defendant's Ford pickup had been 'regularly used for carrying freight and merchandise', our inquiry is restricted further to the narrow question as to whether the jury reasonably might have found that such pickup was 'a motor vehicle designed * * * for carrying freight and merchandise.' (All emphasis herein is ours.)

"[6] 'Designed' has been defined as 'appropriate, fit, prepared, or suitable' and also as 'adapted, designated, or intended.' 26A C.J.S. 863; Smith v. Commonwealth, 190 Va. 10, 55 SE2d 427, 429. See also Black's Law Dictionary (4th Ed.), pp. 533-534. When applied to property, 'designed' ordinarily refers to the purpose for which it has been constructed [26A C.J.S. 863], and the purpose contemplated and intended by the manufacturer, not the purchaser, usually becomes the controlling factor. Consult United States v. Sommerhauser, D.C. Kan., 58 F.2d 812, 813; Jacobs v. Danciger, 328 Mo. 458, 467, 41 SW2d 389, 391(5), 77 A.L.R. 1237; State v. Etchman, 184 Mo. 193, 201, 83 SW 978, 980. 'Freight is defined as the transportation of goods' [Ex parte Lockhart, 350 Mo. (banc) 1220, 1228, 171 SW2d 660, 663]; and, merchandise' is a broad and comprehensive term, embracing all tangible articles of commerce--whatever is usually bought or sold in trade. State v. Jeffords, Mo., 64 SW2d 241, 242; 57 C.J.S., Merchandise, p. 1055.

Honorable Paul E. Williams

'Merchandise may mean cambric, needles, or crowbars, sugar or vinegar, Coates No. 200 cotton thread or two-inch cable rope, or * * * any one of the hundreds of articles classed as merchandise' [Whitewater Mercantile Co. v. Devore, 130 Mo.App. 339, 347, 109 SW 808, 809], and the term 'merchandise' also may encompass agricultural or horticultural products. State v. Long, 203 Mo.App. 427, 429, 220 SW 690, 691. So, it may be said that a 'commercial motor vehicle' within the contemplation of the statutory definition here controlling, to-wit, 'a motor vehicle designed * * * for carrying freight and merchandise' [Section 301.010(1)], is a motor vehicle suitable and adapted for the purpose, intended by the manufacturer, of the transportation of goods and tangible articles of commerce, whatever they may be."

In the instant case you have informed us orally, as you have also indicated in your letter, that the truck in question was not used to transport passengers or merchandise or any other thing for hire but simply used by its owner to carry about things which are used upon the farm, groceries, farm products and, et cetera, that the truck is used as a passenger car by its owner in transporting him from place to place.

In view of the opinion in the Laswell case, we must conclude that the truck in question is a commercial motor vehicle.

CONCLUSION

It is the opinion of this department that a half-ton pickup truck, although used primarily for the transportation of persons and not regularly used for the transportation of freight and merchandise, is a commercial motor vehicle within the meaning of numbered paragraph one of Section 301.010, RSMo, C.S. 1957, and being so its owner must comply with Section 301.330, RSMo, C.S. 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ar